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“TO LAY AND COLLECT TAXES”: THE CONSTITUTIONAL CASE FOR PROGRESSIVE TAXATION

By Leo P. Martinez[†]

*We “ain’t got no choice.”*¹

John Steinbeck

I. INTRODUCTION

For centuries, people have debated whether the wealthy should pay more taxes than the poor, and if so, how much more. These issues have never been resolved, and solutions that will satisfy everyone seem unlikely to emerge. In this nation, the notion of “progressive” taxation sparked one of the early battles over tax distribution. Supporters of progressive taxation favored a graduated tax structure, where the tax *rate* would increase with the taxpayer’s income.² Opponents of progressive

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1. JOHN STEINBECK, *THE GRAPES OF WRATH* 66 (1939). This reference, for which I thank Bret Birdsong, requires explanation. There is a point in Steinbeck’s *The Grapes of Wrath* in which Tom Joad and Casy encounter Muley Graves. Tom allows that he is hungry and asks, “What you gonna eat, Muley? How you been gettin’ your dinner?” Muley responds by showing Tom and Casy two cottontails and a jackrabbit. Casy picks up one of the rabbits and asks, “You sharin’ with us, Muley Graves?” Muley responds, “I ain’t got no choice in the matter.” Noting the ungracious sound of his words, Muley continues, “That ain’t like I mean it. . . . [w]hat I mean, if a fella’s got somepin to eat an’ another fella’s hungry — why, the first fella ain’t got no choice.” *Id.*

In the spirit of Muley Graves, my view is that distributive justice requires progressive taxation. However, my view is irrelevant to the question of whether the sovereign has the *power* to tax progressively.

2. See CAROLYN WEBBER & AARON WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD* 347 (1986) (“Progressive taxation was not a new idea. From the last quarter of the eighteenth century, minority opinion had favored taxing incomes of wealthy persons more heavily than those of poorer ones.”). See generally ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913* (1993). During the Civil War, Illinois Senator John Trumbull made the following appeal in favor of progressive taxation: “[When the poor] are fighting to protect the millionaires

taxation believed that a person should not pay a higher tax rate just because he or she earned a higher income.³ For most of the nineteenth century, however, this country did not collect an income tax at all.

The debate over progressive taxation intensified at the turn of the twentieth century with the passage of the Sixteenth Amendment, which permitted a federal income tax.⁴ In 1913, Congress passed its first "lawful" income tax.⁵ To the dismay of many, it was progressive.⁶ Prior to the Sixteenth Amendment, the debate over the proper form of income tax went relatively unnoticed. When the income tax debate started to affect the pocketbooks of an entire nation, people began to pay more attention.⁷

From the outset, scholars expressed dissatisfaction with the notion of progressive taxation.⁸ Early writers criticized progressive taxation on the basis that it was "unfair" to pay greater than one's proportionate share.⁹ As one writer contended, it is "untenable . . . that a man's ability to pay ought to be taken as a measure of what he should be made to pay."¹⁰

who are receiving hundreds of thousands of income every year . . . the millionaires can afford to pay liberally of their means." *Id.* at 34 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2513 (1864)).

3. See generally STANLEY, *supra* note 2. Pennsylvania Senator Thaddeus Stevens once noted that "it is a strange way to punish men because they are rich." *Id.* at 33 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1875 (1864)). His colleague, Justin Morrill, commented that while "no one doubts our constitutional power to levy this tax, [the graduated rate] is in fact no less than a confiscation of property." *Id.* at 33 (quoting CONG. GLOBE, 38th Cong. 1st Sess. 1875, 1943 (1864)).

4. Ratified in 1913, the Sixteenth Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

5. See ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* 21 (2d ed. 1995). Hall and Rabushka refer to the 1913 federal income tax as the "first lawful federal income tax." *Id.* In truth, there were others. For example, there was a Civil War income tax that lasted from 1861 to 1872. See *id.* at 20. What Hall and Rabushka meant by "lawful," and what I hope to convey by adopting their term, is that the 1913 income tax was the first one enacted with express constitutional support.

6. See JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 78 (1985) ("The final income tax provisions that emerged from conference and became law on October 3, 1913, were a blend of compromises The exemption for dependent children was dropped, but the marriage differential remained, as did the graduated rate structure that the radicals forced through the Senate."); HALL & RABUSHKA, *supra* note 5, at 20 ("[The 1913 income tax] imposed six 'super tax' brackets of 1 percent each on additional chunks of taxable income, reaching a top rate of 7 percent on taxable income over \$500,000.").

7. Upon U.S. intervention in World War I, Congress dramatically increased both the rates and the progressivity of the income tax. The lowest bracket was raised from one to six percent, and the highest bracket went from seven to seventy-seven percent. See HALL & RABUSHKA, *supra* note 5, at 21. In addition, the large exemptions were reduced. See *id.* "The income tax was transformed from a tax on the wealthy to a tax on the burgeoning middle class." *Id.*

8. See generally Frank Warren Hackett, *The Constitutionality of the Graduated Income Tax Law*, 25 YALE L.J. 427 (1916); Note, *Progressive Income Taxes*, 12 COLUM. L. REV. 443 (1912).

9. See Hackett, *supra* note 8, at 445 (decrying the fairness of progressive income tax); Note, *supra* note 8, at 445 (questioning application of a case upholding the constitutionality of an inheritance tax case to the income tax).

10. Hackett, *supra* note 8, at 437.

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Still, it was not until the celebrated 1952 classic, *The Uneasy Case for Progressive Taxation*,¹¹ by Professors Blum and Kalven, that a systematic and scholarly analysis of progressive taxation was undertaken. Significantly, Professors Blum and Kalven criticized progressive taxation primarily on economic grounds and conceded its constitutionality.¹²

In his 1985 book, *Takings: Private Property and the Power of Eminent Domain*,¹³ Professor Richard Epstein added a new twist to the debate over progressive taxation. He questioned the constitutionality of progressive taxes, suggesting that they might violate the Fifth Amendment Takings Clause.¹⁴ However, despite his unalterably critical view of progressive taxation, Epstein tempered his criticism with the honest admission that his conclusions ignored Supreme Court decisions and contradicted precedent in some instances.¹⁵ Epstein conceded that his claims would have far-reaching import and might require invalidation of much post-New Deal jurisprudence and legislation.¹⁶

After some years of dormancy, my friend and colleague, constitutional law scholar Calvin Massey, has undertaken a constitutional attack on progressive taxation that revives Epstein's theories.¹⁷ Massey takes the path that his predecessors had hitherto avoided. Shedding Epstein's concession that the Supreme Court has upheld progressive taxation, he argues that the Court has never squarely addressed the question and should, in fact, find it unconstitutional.

I dispute Massey's conclusion that progressive taxation is unconstitutional; established doctrine correctly resolves the constitutional question in favor of the government's power to tax progressively. This article will examine Massey's propositions, and it will reveal the well-founded constitutional underpinnings of progressive taxation.¹⁸ The myriad tax policy arguments for progressive taxation, in union with the compelling gov-

11. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952).

12. See *id.* at 427 ("[T]he result [of Supreme Court decisions upholding progressive taxation] seems clearly sound on constitutional grounds even when tested against current notions of substantive due process.").

13. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

14. See *id.* at 295-303. The Fifth Amendment of the U.S. Constitution reads, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

15. See EPSTEIN, *supra* note 13, at ix-x.

16. See *id.* at ix, 281.

17. See Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85 (1996).

18. As I hope this article makes clear, I feel that policy considerations argue strongly against imposing Fifth Amendment constraints on progressive taxation. Simply put, the vital role taxes play in the existence and functioning of the government should persuade the Court to uphold the power to tax progressively.

ernmental need to collect taxes, drive the Court to view expansively Congress's taxation powers. This presumption of constitutionality cannot be overstated; the Court sees taxation as the domain of the legislature. I conclude that the sovereign's broad power to tax requires judicial deference to legislative choices among different taxation regimes.

Part II of this piece familiarizes the reader with Massey's argument. It includes an explanation of the debate over progressive and proportional or "flat"-rate taxation, and a short survey of other writers who, like Massey, take exception to progressive taxation.

Part III contains the bulk of my response to Massey's argument, in which I make the case that progressive taxation is, indeed, constitutional. First, I demonstrate the breadth of the government's consistently sanctioned and highly discretionary power to tax. I then lay out the categories of taxes that have been shown to violate the Constitution, and I explain why progressive taxation does not fit into any of those categories.

Finally, in Part IV, I address the particular arguments advanced by Calvin Massey in his attempt to discredit progressive taxation. I respond that his primary attack, a resort to "benefits" theory,¹⁹ is inapplicable to progressive taxation, and most responsible policymakers do not advance it in support of progressive taxation. The Supreme Court has vindicated this view on numerous occasions. The world in which we live gives legislatures wide latitude to craft methods of taxation. The Supreme Court is, at best, reluctant to second guess legislatures. Even Massey ultimately must yield to pragmatism.

Before I begin, it bears mention that my tax colleagues reacted with what could be charitably described as skepticism to Massey's constitutional arguments. Their reaction may be attributable to the existence of an uneasy relationship between constitutional law scholars and tax scholars.²⁰ Neither seems inclined to tread in the other's domain.²¹ Despite my colleagues' reaction, I see Calvin Massey's work as a useful and legitimate inquiry into a matter tax scholars appear to take for granted.

II. PROGRESSIVE TAXATION

This Part begins with a brief survey and explanation of the debate over progressive taxation. Although many scholars support progressive taxes on grounds of fairness and efficiency, others object that progressive

19. For a description of benefits theory, see *infra* notes 81-89 and accompanying text.

20. I ask the reader's indulgence in not seeing the latter as oxymoronic.

21. A disclaimer may be appropriate. I cannot be described as a close student of constitutional law. My expertise, if it can be called that, is in tax policy. Normally, I would defer to Calvin Massey's constitutional expertise, not only out of politeness or courtesy, but because he has taught me much about the strange and arcane currents of constitutional law.

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taxation is neither fair nor efficient. The second section brings arguments against progressive taxation to the surface. These arguments will give the reader a sense of the backdrop against which Calvin Massey wrote his article. The last section summarizes Massey's contribution to the fray. He asserts that the Supreme Court should declare that progressive taxation is an unconstitutional taking because the government does not justly compensate wealthier taxpayers who surrender a higher proportion of their income.

A. *A Progressive Taxation Primer*

In *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith observed, "[a]ll nations have endeavored . . . to render their taxes as equal as they could contrive; as certain, as convenient to the contributor, both in the time and in the mode of payment, and in proportion to the revenue which they brought to the prince, as little burdensome to the people."²² Smith is but one of many great thinkers who have noted what should be obvious; a system of taxation should be fair.²³ That is, the burden of paying a tax should be borne equally or at least be levied in a consistent and rational fashion.²⁴ As one might expect, fair distribution of the tax burden is a central concern for legislatures enacting tax laws.²⁵

22. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 417 (James E. Thorold Rogers ed., 3d ed. 1869) (1776).

23. See *Dane v. Jackson*, 256 U.S. 589, 598-99 (1920); *Tappan v. Merchants' National Bank*, 86 U.S. 490, 504 (19 Wallace 1873); *Morton Salt Co. v. City of South Hutchinson*, 159 F.2d 897, 901 (10th Cir. 1947); Neil H. Jacoby, *Guidelines of Income Tax Reform for the 1960's*, in 1 TAX REVISION COMPENDIUM, HOUSE COMM. ON WAYS AND MEANS, 86th Cong., 1st Sess. 157, 158-60 (Comm. Print 1959); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 574-86 (1965).

24. While the policy underpinnings of this premise are solid, I voice doubts in the article that fairness (at least as a substantive proposition) is of constitutional dimension.

25. See, e.g., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, H.R. CONF. REP. NO. 841, at 7 (1986) (indicating that its primary objective is to ensure that individuals with similar income pay similar amounts of tax); SENATE FINANCE COMMITTEE REPORT ON THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, S. REP. NO. 494, at 97 (1982) (stating that the Act is designed to improve tax equity); RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 5-6 (1973) ("[T]ransfer policies [distributions between wealthy and poor] remain of major importance."); JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 5 (1987) (explaining that "[a] distinct policy objective of the federal taxation scheme is the distribution function"); JOEL SLEMROD AND JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE GREAT DEBATE OVER TAX REFORM* 49 (1996) ("Fairness . . . deserves close scrutiny because much of the bewildering complexity of the tax law is justified in its name.").

In July 1999, the Republicans in both Houses of Congress were drafting tax bills aimed at the so-called "marriage penalty," because they believed it was unfair. See Richard W. Stevenson, *Clinton Warns Against G.O.P. Tax Cuts*, N. Y. TIMES, July 17, 1999, at A20. Representative Michael Castle of Delaware, commenting on the bill being written in the House, said, "[m]y final concern is whether this is the most fair tax bill we could produce. . . . I believe the bill drafted in the Senate is superior because it provides more tax relief for lower and middle income families, encourages saving and provides more relief from the marriage penalty." 145 CONG. REC. H6213.

However, crafting a system of taxation that results in a fair distribution has proven to be a daunting task. In their attempt to achieve a fair distribution of the tax burden, tax policy-makers rely on two crude principles: horizontal equity and vertical equity.²⁶ Horizontal equity provides that similarly situated taxpayers should be similarly taxed.²⁷ It is an intuitive concept that enjoys wide acceptance.²⁸

The principle of vertical equity, however, is much more controversial.²⁹ Vertical equity requires that high-income taxpayers should contribute more tax dollars to the fisc than low-income taxpayers.³⁰ It concerns "[t]he proper pattern of unequal taxes among people with unequal incomes."³¹

The search for vertical equity, or the proper tax distribution among people with unequal incomes, is the source of my conflict with Massey.³² To place our disagreement in sharp focus, it is useful to describe the two most common tax structures that seek to achieve vertical equity.³³ A pro-

The Republicans are not alone. A recent poll showed that "[m]any tax professionals want Congress to end the 'marriage penalty,' under which couples filing jointly can pay up to \$7,000 more in taxes annually. 'It is simply not fair that two wage earners who just happen to be legally married pay more taxes than two wage earners who are just living together,' one respondent wrote." David Cay Johnston, *Personal Business: Diary; A Wish List of Changes for the Federal Tax Code*, N. Y. TIMES, November 22, 1998, at D10.

Even the Executive takes pains to cite fairness as a centerpiece of tax initiatives. See John M. Broder, *With the Federal Deficit Falling, the President Weighs a Tax Cut*, N. Y. TIMES, Dec. 5, 1997, at A1 (indicating that President Clinton would consider tax reduction if it was "fair").

26. For a sophisticated but concise discussion of problems defining horizontal equity and vertical equity, see generally Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113 (1990).

27. See GEORGE F. BREAK & JOSEPH A. PECHMAN, *FEDERAL TAX REFORM: THE IMPOSSIBLE DREAM?* 5 (1975) (explaining that a system that treats equally all those who are in economically similar positions is known as horizontal equity); MUSGRAVE & MUSGRAVE, *supra* note 25, at 5; David M. Hudson, *Tax Policy and the Federal Taxation of the Transfer of Wealth*, 19 WILLAMETTE L. REV. 1, 3 (1983) (stating that similarly situated persons should be taxed in a similar manner); Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 619 (1996) (horizontal equity "says that those with equal amounts of income should pay equal amounts of tax").

28. See BREAK & PECHMAN, *supra* note 27, at 79-80 ("[M]ost people subscribe to at least the general principle of horizontal equity."). While I do not quarrel with the principle, I will save for another time my questions concerning its constitutional underpinnings.

29. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992) (upholding a tax which favored pre-1976 property owners advantageously over purchasers of California property after 1976).

30. See BREAK & PECHMAN, *supra* note 27, at 5 (vertical equity is "the distribution of tax burdens among people with different amounts of income and wealth . . ."); Hudson, *supra* note 27, at 4.

31. MUSGRAVE & MUSGRAVE, *supra* note 25, at 199.

32. Calvin Massey is a proponent of using a proportional or "flat" tax rate to achieve vertical equity. See Massey, *supra* note 17, at 85, n.2. I prefer progressive taxation.

33. This analysis assumes that the subject of the progressive scheme is the income tax. It is, of course, possible to tax progressively in other than an income tax scheme. Some early tax cases, for example, dealt with the progressive features of wealth transfer taxes. See, e.g., *Knowlton v. Moore*, 178 U.S. 41, 109 (1900) (discussing progressivity of inheritance tax); see also Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 742 (1995) (discussing progressivity

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portional, or so-called “flat rate” tax, applies the same percentage rate of taxation to all taxpayers. For example, with a 10% flat rate of taxation, a taxpayer who earns \$10,000 in a year would pay a tax of \$1,000 and a taxpayer who earns \$3 million would pay a tax of \$300,000.

A progressive tax, on the other hand, applies an increasing percentage rate of taxation as income increases.³⁴ For instance, with a progressive rate of taxation, a taxpayer who earns \$10,000 in a year might pay at a 5% rate resulting in a tax of \$500. A taxpayer who earns \$3 million might pay at a 35% rate resulting in a tax of \$1,050,000.

The point of contention is not that higher-income earners should contribute more absolute tax dollars;³⁵ rather, the debate centers on how much more they should contribute. A progressive system attempts to recognize that each dollar matters more to a poor person than it does to a wealthy person. Thus, the payment of a \$500 tax may affect the taxpayer who earns \$10,000 more than the loss of \$1,050,000 affects the taxpayer who earns \$3 million.³⁶

Legislatures often choose progressive taxation over strictly proportional taxation when attempting to achieve a fair distribution of tax burdens.³⁷ Two scholars once observed that “progressive taxation appears to be the choice of modern democratic societies.”³⁸ Likewise, a broad consensus agrees that a flat tax is no panacea. In a recent round of tax legislation, for example, the Joint Committee on Taxation discussed the effects of a new progressive tax scheme on individuals and families.³⁹ The Committee concluded that “[the fairness] dilemma cannot be resolved by moving to a proportional tax system.”⁴⁰

Aside from issues of fairness, policymakers sometimes lean toward

in the context of consumption and wealth transfer taxes). I will not address the merits, such as they may be, of a “head tax” which undertakes to tax each person the same amount without regard to ability to pay. On this topic, see Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1913 (1987). Even Massey rejects such an approach because of its regressivity. See Massey, *supra* note 17, at 87.

34. In Calvin Massey’s parlance, a progressive tax takes a greater percentage of Bill Gates’s income than it takes from lesser mortals. See Massey, *supra* note 17, at 104-105. Note that above the income level at which the top rate applies, the tax becomes a flat tax and the super-rich are taxed at the same rate as the merely well-off.

35. That war is waged between the defenders of the “head” tax and the defenders of either the proportional or the progressive tax. See *supra* note 33 and accompanying text.

36. See MUSGRAVE & MUSGRAVE, *supra* note 25, at 250-255.

37. See WEBBER & WILDAVSKY, *supra* note 2, at 320-23 (1986) (explaining that progressive taxation was popular in the 19th century because it was seen as fair). During the Civil War, even the Confederacy adopted a progressive tax system as a means of generating revenue. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 615 (1988).

38. BREAK & PECHMAN, *supra* note 27, at 6.

39. See STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., *IMPACT ON INDIVIDUALS AND FAMILIES OF REPLACING THE FEDERAL INCOME TAX* (1997).

40. *Id.* at 101.

progressive taxes because they raise more money than flat taxes.⁴¹ In truth, the actual economic effects of progressive schemes of taxation on the generation of revenue remain fertile grounds for debate.⁴² However, that subject is too broad to examine here and is (fortunately) not necessary to establish that progressive taxation is constitutional.⁴³

B. Dissatisfaction with Progressivity

Scholars have long recognized that progressive taxation has never been well-justified.⁴⁴ The difficulty stems from the indeterminacy of such

41. See, e.g., Martin J. McMahon, Jr., *Individual Tax Reform for Fairness and Simplicity: Let Economic Growth Fend for Itself*, 50 WASH. & LEE L. REV. 459, 465 (1993). Dismayed by recent reductions in the progressivity of the income tax, Professor McMahon contends that "the partial victory of the 'flat taxers' should be repudiated and progressivity in the rate structure restored. Marginal income tax rates for those at the very top of the income distribution should be increased even more. *Doing so will improve vertical equity and enhance revenues.*" *Id.* at 465 (emphasis added).

This statement requires explanation and qualification. Assuming that the government needs a fixed amount of revenue, resort to a flat tax necessarily means that the burden borne by the wealthy is shifted to the poor or at least the less-wealthy. The more limited ability of low income taxpayers to pay, combined with their relatively greater numbers, means that it will cost more to collect the same amount of revenue with a proportional tax than with a progressive tax.

42. Other-than-economic justifications for progressive taxation abound. See, e.g., Marjorie Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 509-18 (1987) (justifying progressivity on feminist grounds); Beverly Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, WIS. L. REV. 751, 752-53 (1996) (justifying progressivity on racial grounds).

43. Economists' opinions of progressive and proportional taxation vary greatly. One view is that a flat tax scheme is the solution to the revenue generation problem. See ROBERT E. HALL & ALVIN RABUSHKA, *LOW TAX, SIMPLE TAX, FLAT TAX* 53 (1983) ("[T]he simple [flat] tax will bring the faltering American economy back to life."). Adherents to this view believe that a progressive tax is detrimental to the entrepreneurial enterprise and is a disincentive to work and to save. See *id.* at 53-57. On the other hand, some economists believe that the disincentives to work created by progressive taxation are minimal and that many workers cannot simply change their work patterns to respond to changing tax rates. See Martin J. McMahon, Jr., *Renewing Progressive Taxation*, 60 TAX NOTES 109, 111 (1993) ("[M]ost empirical studies indicate that the work effort of primary wage earners does not change significantly in response to after-tax pay changes . . ."). McMahon crosses the borderline with his uncharitable observation that the rock icon Madonna may have reduced her tax liability if she had worked a little less, but that may have been a positive effect in and of itself. See *id.* at 112, n.34. Additionally, these economists assert that a progressive tax rate is an effective method of generating income and may actually help maintain a constraint on government spending. See *id.* Other economists view progressivity through a different lens. See Gene Steuerle, *How a Progressive and Broad-Based Income Tax Constrains Government Activity*, 52 TAX NOTES 225 (1991) (criticizing progressive taxation on the basis that it provides inadequate revenue based on low rates for middle income taxpayers and even lower rates for poor taxpayers).

44. See, e.g., Boris Bittker, *The Income Tax: How Progressive Should It Be?*, in COLLECTED LEGAL ESSAYS 229, 233 (1989) (discussing how the case for progressive taxation is uneasy); MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 220-226 (1997) (discussing relative satisfaction and dissatisfaction with progressivity); Byrne, *supra* note 33, at 740 (arguing that the case for progressivity is uneasy because of unexamined philosophical assumptions); Nancy C. Staudt, *The Political Economy of Taxation: A Critical Review of a Classic*, 30 L. & SOC'Y REV. 651, 665 (1996) (outlining the difficulty of establishing a "fair" rate of taxation).

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concepts as “justice” and “fairness.”⁴⁵ These vague and standardless terms contain no prescription for how best to achieve them.⁴⁶ Although progressive taxation has ample support from the government and academia alike, it has also attracted many critics.

In their classic 1952 study, *The Uneasy Case for Progressive Taxation*, Professors Blum and Kalven examined the ability (or rather inability) of progressive taxation to generate revenue efficiently.⁴⁷ They addressed three separate concerns about progressive tax systems.⁴⁸ First, progressive taxes can become too complicated, and clever taxpayers can use loopholes “lawfully” to avoid paying taxes.⁴⁹ The second concern, celebrated by economists as *the* reason to avoid progressive taxes, is that society’s economic productivity falls when a rising tax rate diminishes the incentive to generate more income.⁵⁰ Finally, Blum and Kalven described progressive income taxation as a “politically irresponsible formula” because it enables a majority (middle and lower income level earners) to set tax rates that fall exclusively upon the minority (high income earners).⁵¹

Like Professors Blum and Kalven before him, Professor Ronald Rotunda of the University of Illinois also argued against progressive taxation on economic grounds.⁵² Straying from his constitutional law expertise, Rotunda effectively captured the essence of the Blum and Kalven economic policy arguments against the progressive rate structure. He maintained that a flat tax would really be more “progressive” because historical evidence suggests that when overall tax rates are lower, higher income earners declare more taxable income and actually pay more taxes.⁵³ Rotunda also argued that progressive taxation not only unnecessarily complicates the tax code, but is counterproductive because tax shelters allow the truly wealthy to avoid paying the higher rates.⁵⁴ He concluded that by eliminating tax shelters, reducing deductions, and setting

45. Bankman & Griffith, *supra* note 33, at 1913; see also Leo P. Martinez, *Taxes, Morals and Legitimacy*, 1994 BYU L. REV. 521, 549 n.102 (1994).

46. See Charles R. O’Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727, 738 (1985) (explaining that redistribution is insufficient justification for progressivity because it provides no design guidance).

47. See Blum & Kalven, *supra* note 11, at 430-37.

48. See *id.*

49. See *id.* at 431.

50. See *id.* at 437-38.

51. *Id.* at 435-36.

52. See Ronald D. Rotunda, *Flat Taxes: A Progressive Way To Go*, LEGAL TIMES, Nov. 27, 1995, at 20.

53. See *id.* As Kevin Phillips has pointed out, however, the less progressive tax regime results in an increase in wealth of the rich and the relative impoverishment of the poor. See KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* 23-25 (1990).

54. See Rotunda, *supra* note 52.

an income floor below which nobody would pay taxes, a flat tax would actually increase tax revenues generated from the higher income earners.⁵⁵

Rotunda argued that the complexity of the Internal Revenue Code breeds unfairness; he suggested that a reduction in capital gains taxes would be fair and that a flat tax would result in a more equitable allocation of the tax burden among income classes.⁵⁶ At its core, Rotunda's advocacy for a flat tax simply exploits the indeterminacy of "justice" and "fairness." While Rotunda does not explicitly concede the constitutionality of progressive taxation, he neither attacks nor questions it.⁵⁷

Taking a decidedly different tack, Professor Richard Epstein employed a literal reading of the Fifth Amendment Takings Clause to question the constitutionality of many forms of interference with private property rights, including progressive taxation, in his book, *Takings: Private Property and the Power of Eminent Domain*.⁵⁸ According to Epstein's theory of the Takings Clause, progressive taxation is unconstitutional because the government is unlawfully "taking" private property for public use without providing appropriate compensation to the taxpayer.⁵⁹

Greatly simplified, Epstein grounded his case against progressive taxation in the following logic: because everyone agrees that it violates the Eminent Domain Clause for the government to take an individual's property without compensation to build a road, it must also be unconstitutional to take away a wealthy person's money through taxation and distribute it to others without adequate compensation.⁶⁰ In other words, the failure of governments to proportionately compensate the wealthy for the additional taxes they pay means that progressive taxation must violate the Eminent Domain Clause.⁶¹ Convinced that governments cannot compensate taxpayers progressively, Epstein warned, "[t]he case for the progressive tax [was] not 'uneasy.' It [was] wrong."⁶²

Epstein's theories were not well-received.⁶³ One scholar observed that

55. *Id.*

56. *Id.*

57. *See id.* Rotunda calls a flat tax "major reform," implicitly conceding that a flat tax is not the only constitutional possibility.

58. In Epstein's world, progressive income taxation is a *prima facie* taking. *See* EPSTEIN, *supra* note 13, at 162.

59. *See id.* at 295-303. Epstein includes under his umbrella, worker's compensation laws, welfare, and land use regulations. *See id.* at x. Needless to say, he takes a dim view of even the public use notion. *See id.* at 161, 308.

60. *See id.* at 195-215, 295-303, 308.

61. *See id.* at 298-300; *see also* Massey, *supra* note 17, at 88.

62. EPSTEIN, *supra* note 13, at 303.

63. *See, e.g.,* Thomas Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 22-23 (1986); Thomas Ross, *Taking Takings Seriously*, 80 NW. U. L. REV. 1591, 1592 (1986); Jeremy Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743, 744 (1986) (book review); Joseph

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“[f]or most reviewers, [Epstein’s] conclusions are so antithetical to conventional wisdom that they discredit the entire book.”⁶⁴ Another kind scholar stated that, from an academic perspective, Epstein’s book is a “patent and howling failure,” although he concluded that it might influence the “popular audience” of learned non-lawyers.⁶⁵

Beyond the broadsides, however, nobody directly challenged the premise that progressive taxation is a taking.⁶⁶ Epstein’s admission that his conclusions ignored Supreme Court decisions perhaps best explains this lack of response.⁶⁷ Despite his offer of constitutional challenges to various kinds of state action on Takings Clause-grounds, he conceded that the Court had not been open to these challenges: “In instance after instance the Court has held state controls to be compatible with the rights of private property.”⁶⁸

C. *Calvin Massey’s Case Against Progressivity*

Blum, Kalven, Rotunda, and Epstein worked from the premise that the power to tax progressively is firmly entrenched in contemporary constitutional jurisprudence. Calvin Massey does not accept this assumption. Like Epstein, Massey argues that progressive taxation constitutes a “taking” within the meaning of the Fifth Amendment.⁶⁹ Although Massey admits that Epstein’s ideas have been “dismissed by academics,” his article nevertheless revives Epstein’s theories to examine anew the implications of the Takings Clause for progressive taxation.⁷⁰ In an evolutionary step beyond Epstein, Massey’s fundamental proposition is this: the Supreme Court has never explicitly decided whether progressive taxation is an uncompensated regulatory taking, and therefore the Court could declare progressive taxation unconstitutional if presented with the issue today.⁷¹ Looking to Epstein’s theory as a “powerful and elegant logical exposition of limits on the power of governments to seize property,” Massey argues that a straightforward application of the Court’s contemporary regulatory holdings doctrine should render progressive taxation

Sax, *Takings*, 53 U. CHI. L. REV. 279, 280 (1986) (book review).

64. Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1562 (1986) (book review).

65. Ross, *supra* note 63, at 1592.

66. See Sax, *supra* note 63, at 280-285; see also MASSEY, *supra* note 17, at 90.

67. See EPSTEIN, *supra* note 13, at ix-x.

68. *Id.* at x.

69. See Massey, *supra* note 17, at 101 (citing *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24-25 (1916)).

70. Massey, *supra* note 17, at 85-86.

71. See *id.* at 88.

unconstitutional.⁷²

Massey begins with a historical review of Supreme Court decisions concerning the validity of the income tax.⁷³ He contends that the Court has never expressly considered whether the Takings Clause bars progressive taxation.⁷⁴ Massey further believes that in a 1916 opinion, *Brushaber v. Union Pacific Railroad*,⁷⁵ the Court intimated that the Fifth Amendment's Takings Clause could invalidate an "arbitrary" tax enacted for the "confiscation of property."⁷⁶ According to Massey, because the Court has never revisited the issue, the constitutionality of progressive income taxation remains "territory totally unexplored by the Court."⁷⁷

Massey then examines what he calls the "boundary between taxation and taking."⁷⁸ Noting that the Court has used the Equal Protection and Free Speech guarantees to invalidate tax laws, he reasons that the Takings Clause should also limit tax laws because the limits it places on state power are no less important than those of other constitutional provisions.⁷⁹ Unfortunately, Massey proposes no test to determine when taxation crosses the "boundary" and becomes a taking.⁸⁰ Massey simply seems to argue that a "taking" occurs whenever the government takes a greater percentage of one person's income than another's. As will be made clear, this position is untenable.

Massey next attempts to discredit the arguments that seek to explain

72. *Id.* at 94.

73. *See id.* at 95-102. Massey examines the following cases: *Springer v. United States*, 102 U.S. 586 (1881), which rejects the belief that the income tax is an unapportioned direct tax; *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1869), which concludes that a tax on the income of insurance companies was indirect; *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 346 (1875), which holds that a "succession tax" on real property was an "excise tax" and not an unapportioned direct tax; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *modified on reh'g*, 158 U.S. 601 (1895), which holds that the income tax at issue was an invalid direct tax; *Magoun v. Illinois Trust & Sav. Bank*, 170 U.S. 283 (1898), which rejects the theory that a progressive rate state inheritance tax violated equal protection; and *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916), which holds that the income tax did not violate the Due Process Clause.

74. *See* Massey, *supra* note 17, at 102.

75. 240 U.S. 1 (1916).

76. *See* Massey, *supra* note 17, at 121 (citing *Brushaber*, 240 U.S. at 24-25). Presumably, such an arbitrary tax would be constitutionally impermissible under the "harsh and oppressive" rubric. *See infra* Part III.

77. Massey, *supra* note 17, at 102.

78. *Id.* at 102.

79. *See id.* at 103-104. Massey says that:

[N]o one would argue that the Equal Protection Clause would permit an income tax system that imposed differential rates based on the race of the taxpayer. Similarly, no one would contend that the Free Speech Clause would allow an income tax system that imposed higher tax rates on income derived from the authorship of political books as compared to rates imposed on income from other sources. Likewise, the Takings Clause necessarily limits the taxing power. After all, taxation is, by definition, a taking.

Id. (internal citations omitted).

80. Of primary importance to Massey is the degree to which the Takings Clause should limit progressive taxation. *See id.* at 104.

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why taxation is not an uncompensated taking—benefit theory and sacrifice theory.⁸¹ According to benefit theory, the distribution of government benefits increases with income, and the tax structure should reflect this.⁸² Massey concludes that “a successful defense of progressive tax rates must demonstrate that as a taxpayer’s income increases, the taxpayer receives an *ever-increasing proportion of the public benefits* purchased with tax revenues.”⁸³

Benefit theory is divided into two arguments, “property benefits” and “income-equals-benefit.”⁸⁴ The “property benefits” argument suggests that, although personal benefits are roughly uniform, the amount of property benefits rises with the amount of property owned.⁸⁵ Massey dispenses with that notion by pointing out that public expenditures do not increase with a person’s property: “National defense, internal security (such as police and fire protection), and the legal system are all public benefits critical to property protection. But providing these benefits in sufficient quantity to protect persons will also necessarily protect property.”⁸⁶ An increase in one person’s property will not translate into added defense expenditures, thus the wealthier taxpayer receives no added benefit for the higher taxes he pays.

The “income-equals-benefit” argument suggests that personal income is the measure of the “personal well-being” that the government protects.⁸⁷ Thus, a wealthy taxpayer automatically receives more benefit than a poor taxpayer, even though they receive the same protection by the same government. According to Massey, this is “the perfect justification for a single-rate proportional tax. It does nothing, however, to justify progressive rate taxation.”⁸⁸

Massey holds that while benefit theory suffices to justify taxation, “it fails to explain why *progressive rate taxation* is not an uncompensated taking, because benefit theory does not prove that the share of benefits received increases with income.”⁸⁹

Massey then turns to sacrifice theory. According to sacrifice theory, “[e]quity ‘requires inflicting equal hurt on each taxpayer.’”⁹⁰ However, sacrifice theorists do not calculate “hurt” with monetary units; rather,

81. *See id.* at 105-110.

82. *See id.* at 105-6.

83. *Id.* (emphasis in original).

84. *See id.*

85. *See id.*

86. *Id.*

87. *See id.*

88. *Id.* at 107.

89. *Id.* (emphasis in original).

90. *Id.* at 108 (quoting Blum & Kalven, *supra* note 11, at 455-56).

they measure in terms of the utility of money. Sacrifice theorists assume that, as income increases, the utility of each additional dollar is less than the previous one. Thus “[i]f the utility value of income declines with increases in income, progressive tax rates are required to produce a proportionately equal sacrifice of utility.”⁹¹

Massey attacks sacrifice theory from several angles. First, he argues that nobody has shown that the utility curve for money is steep enough to warrant progressive tax rates.⁹² If it is, then the tax system will be unfair because the whole tax burden could potentially fall on the wealthy, provided their utility level never rises to that of a person of moderate income.⁹³ Second, Massey is not convinced that money actually has declining utility. Pointing to the versatility of money, Massey observes that, for such ventures as savings and philanthropy, utility may remain constant or actually increase with income. Finally, Massey points out that everybody will have a different utility curve. “For sacrifice theory to help defend progressive tax rates, it is necessary to establish that every person has the same utility curve for money. But even the dimmest observer of humanity must concede that this is simply not the case.”⁹⁴

Having dismissed these defenses of progressive taxation, Massey then considers how the Court should apply current regulatory takings doctrine to find progressive taxation unconstitutional.⁹⁵ Drawing upon his experience in constitutional law, Massey asserts that, when confronted with a takings issue, the Supreme Court “employs a two-step process composed of three litmus-test rules and a catch-all balancing test.”⁹⁶ Assuming the role of the Court, Massey applies two of the Court’s litmus-test rules and its catch-all balancing test to progressive taxation, explaining and illustrating the tests along the way.

The first litmus-test rule, permanent dispossession, says that “[w]hen regulations of property permanently dispossess an owner of his property, a per se taking has occurred.”⁹⁷ Massey believes the Court could find that the “*marginal increment* taken by progressive tax rates” is permanently dispossessed and therefore an uncompensated taking.⁹⁸ The second rule,

91. *Id.*

92. *See id.*

93. *See id.* at 109.

94. *Id.*

95. *See id.* at 111-123.

96. *Id.* at 111.

97. *Id.* at 112. *Loretto v. Teleprompter Manhattan*, 458 U.S. 419 (1982), is most closely associated with this concept. There, the Court held that a New York regulation authorizing a cable television company to attach coaxial cable to an apartment building caused a permanent dispossession and thus constituted an uncompensated taking. *See id.* at 441.

98. *Id.* at 112 (emphasis in original).

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loss of economically viable use, maintains that “[i]f a regulation of property leaves the owner with no economically viable use, it is a taking.”⁹⁹ Massey also believes the Court could extend this rule—a rule commonly associated with real property—to protect a taxpayer who “has lost all economic use of that disproportionate share of income taken by the application of graduated tax rates.”¹⁰⁰

If these tests fail to determine whether the law in question violates the Takings Clause, the Court reverts to its catch-all balancing test.¹⁰¹ In this balancing test, the Court weighs the public benefits of the property taken by the government against the private costs suffered by the individual from whom the property is taken.¹⁰² Massey concedes that if progressive rate taxation is neither “a permanent dispossession of a disproportionate share of the taxpayer’s income, . . . [nor] a destruction of all economically viable use of that conceptually severed strand of property, there is not much likelihood that the balancing test will produce a conclusion that graduated rates are an uncompensated taking.”¹⁰³ Undeterred, Massey still argues that public benefits brought about by progressive taxes might not outweigh the private costs.¹⁰⁴

III. THE CONSTITUTIONALITY OF PROGRESSIVE TAXATION

Stripped to its core, Massey’s argument rests primarily on the Supreme Court’s seeming intolerance for arbitrary taxes in *Brushaber*.¹⁰⁵ However, neither that case, nor any other, actually supports his attack on progressive taxation. After discussing the relevance of specific constitutional provisions to taxation, I argue that case law supports broad congressional power to tax progressively. I then describe the Court’s general reluctance to strike down taxes, and discuss those narrow categories in which the sovereign’s power to tax is limited. Not surprisingly, progressive taxation does not fall into any of those categories.

A. *The Constitution’s Role*

The Constitution gives Congress the power “to lay and collect

99. *Id.* at 117.

100. *Id.* at 119. Massey looks to *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), and *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992), two cases involving real property, not taxation, to support this notion. *See id.* at 118-19.

101. *See id.* at 120.

102. *See id.*

103. *Id.* at 121.

104. *See id.*

105. *See id.* at 102 (citing *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 24-25 (1916)).

taxes.”¹⁰⁶ Although the Constitution never explicitly addresses progressive taxation, nothing in the text even hints that the framers intended to limit taxation to a proportional regime. On the contrary, one of the architects of the Constitution, Thomas Jefferson, supported progressive taxation. He wrote: “[A] means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise.”¹⁰⁷

The legislature’s broad discretion to tax survived many challenges in the nineteenth century but met a roadblock in the Supreme Court’s decision of *Pollock v. Farmers’ Loan & Trust Co.*¹⁰⁸ The *Pollock* Court struck down an income tax because it did not meet the constitutional requirement that a direct tax be “apportioned among the several states.”¹⁰⁹ This decision led Congress to pass the Sixteenth Amendment, which allows Congress “to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”¹¹⁰

The Sixteenth Amendment was one of three constitutional amendments proposed and ratified during the Progressive Era, a time characterized by “reformers who sought to root out corruption, refine American politics, and make it more democratic.”¹¹¹ If progressive taxation were so patently offensive to the democratic ideal that it could be characterized as an unconstitutional taking, at least a hint of that sentiment should have appeared in the legislative history. There is none.¹¹²

Two pervasive themes in the 61st Congress—which drafted the Six-

106. U.S. CONST. art. I, § 8, cl. 1.

107. Thomas Jefferson, Letter to James Madison (Oct. 28, 1785), in *THE PAPERS OF THOMAS JEFFERSON* 681, 682 (Julian P. Boyd ed., 1953).

108. 157 U.S. 429 (1895).

109. *Pollock*, 157 U.S. at 607 (citing U.S. CONST. art. I, § 2, cl. 3).

110. U.S. CONST. amend. XVI. Representative Clark, who took part in the debates over the Amendment, called the *Pollock* decision on the income tax of 1894 “one of the great blots on the judicial system of this country.” 44 CONG. REC. 4392 (1909).

111. JOHN R. VILE, *A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS* 199 (2d ed. 1997).

112. Congress was not only concerned with laying to rest general questions on the constitutionality of the income tax, but also with a desire to prevent future Court infringement on their taxation power. There was thus an impetus to create a legislative history which would not restrict their power in the future over the income tax. Notably, an amendment was proposed to the phrase “and may grade the same,” giving distinct and specific authority to grade an income tax. *See id.* at 4108. Proponent Representative Bailey viewed this addition as “necessary only as a matter of abundant caution,” prompted by Justice Brewer’s dissent in *Knowlton v. Moore* arguing that Congress has no power to grade taxes. Bailey later withdrew this amendment based on anticipated voice vote against it on a purely political basis. *See id.* at 4120. He feared the Court would view a rejection of the proposal as a sign that Congress was opposed to a graduated income tax. *See id.* The record shows that the Vice-President indicated the requirement for a unanimous consent to withdrawal by the rest of the Senate. When the vote was taken, there was no objection to withdrawal of the phrase — indicating no desire to create a legislative history precluding a graduated income tax. *See id.*

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teenth Amendment—explain the lack of attention to progressivity. These themes evince an implied legislative intent to allow a progressive tax. First, redistribution (or fairness) values were important to the debate. In the House, discussion centered around the reality that richer states were paying less tax than they rightly should. For example, Representative Clark argued:

Arkansas has one-sixth as many people as New York has, and would under [the head tax] pay one-sixth as much direct tax as New York would, but New York has 30 times as much property value as the State of Arkansas has. So New Yorkers would escape five-sixths of the taxes they ought to pay [The Democrats] are in favor of amending [the Constitution] so that the swollen fortunes of the land can be justly taxed.¹¹³

Representative Payne, who identified himself as an opponent of income taxation, grounded his arguments in fairness:

[The income tax] tends to make a nation of liars; I believe it is the most easily concealed of any tax that can be laid, the most difficult of enforcement, and the hardest to collect; that it is, in a word, a tax upon the income of honest men and an exemption, to a greater or less extent, of the income of the rascals.¹¹⁴

Still, Payne recognized the potential need for an income tax: “[I]f this Nation should ever be under the stress of a great war . . . [an income tax would be necessary] to provide an income adequate to the carrying on of that war.”¹¹⁵ For Payne, the need to collect revenue superseded the need to pass fair tax legislation. The implication was that any unfairness, including that which might inhere in a progressive tax, must yield to necessity.

Second, the Congressional record also reveals that the Sixteenth Amendment was not designed to break new ground.¹¹⁶ Rather, Congress sought to simply nullify the *Pollock* decision and remove all doubt that Congress’s right to tax income—a right exercised on three prior occasions¹¹⁷—is constitutional. Representative Clark referred to Congress’

113. 44 CONG. REC. 4392-93 (1909).

114. *Id.* at 4390.

115. *Id.*

116. *See* 44 CONG. REC. 4390-92 (1909).

117. Congress passed its first two income taxes during the Civil War. The first tax imposed an ungraduated rate of three percent on incomes above \$800. *See* W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA* 26 (1996). However, in 1865, Congress imposed a rate of five percent on incomes between \$600 and \$5000 and ten percent on incomes over \$5000. *See id.* at 26-27. This tax—the nation’s first progressive income tax—remained an effective source of revenue until its expiration in 1872. *See id.* at 29. When support for the income tax reemerged in the early 1890s, it came with support for a high degree of progressivity. *See id.* at 36. “Central to the appeal of a highly progressive income tax during the 1890s was the claim that the tax would both reallocate fiscal burdens according to ‘ability to pay’ and help restore a virtuous republic free of concentrations of economic power.” *Id.* However, complaints about progressivity from most Republicans and northeastern Democrats led Congress to pass a flat tax of two percent on incomes

previous income tax legislation to support the presumed constitutionality of the income tax. He noted, “[e]verybody—everybody in the House, at least—knows that we had two income tax laws prior to the Act of 1894. They were held to be constitutional.”¹¹⁸ That at least one of these taxes was progressive implicitly shows congressional support for progressive taxation at the time the Sixteenth Amendment was adopted.¹¹⁹

B. Supreme Court Support for Progressive Taxation

The government’s power to tax is essentially unlimited.¹²⁰ The reason for this is simple: There is no government without taxation.¹²¹ Throughout its history, the Supreme Court has acknowledged the powerful and fundamental nature of the ability to tax.¹²² From *McCulloch v. Maryland*¹²³ to the present, the Court has affirmed this necessary governmental power in the face of a variety of challenges.¹²⁴ In *McCulloch*, Chief Justice Marshall recognized the fundamental nature of taxation with his celebrated dictum regarding state taxation and sovereign immunity:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measure of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.¹²⁵

The Court has taken pains to articulate that the taxation power

over \$4000. *See id.* at 38.

118. 44 CONG. REC. 4392 (1909).

119. *See* BROWNELEE, *supra* note 117, at 26-27.

120. *See* *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) (“The power to tax is . . . the most pervading of all the powers of government . . .”); WEBBER & WILDAVSKY, *supra* note 2, at 38-147 (outlining ancient systems of taxation).

121. *See* THOMAS CARLYLE, *Signs of the Times*, in *ESSAYS* 5, 16 (1829) (describing government as a “taxing machine”); *see also* *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 236-37 (1899), *aff’d*, 176 U.S. 335 (1900) (Vann, J.). The court held:

The power of taxation [and other powers] underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the state exists They are . . . rights inherent in the state as sovereign. . . . The state cannot surrender them They are as enduring and indestructible as the state itself. *Id.*

122. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (holding that differential taxation power is a “powerful weapon against the taxpayer selected”); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830) (holding that the power to tax “operates on all the persons and property belonging to the body politic” and “has its foundation in society itself”).

123. 17 U.S. (4 Wheat.) 316 (1819).

124. *See, e.g., Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 223 (1987) (upholding a state sales tax on general interest magazines challenged on First Amendment grounds); *Society for Savings v. Coite*, 73 U.S. (6 Wall.) 594 (1867) (upholding a franchise tax on deposits made to Connecticut banks challenged as violating enumerated powers).

125. *McCulloch*, 17 U.S. at 431.

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“resides in the government as a part of itself” and is “never presumed to be relinquished.”¹²⁶ Because the taxing power exists “for the benefit of all” including the government itself, the Court allows seemingly unlimited taxation of all taxpayers over whom the government has “sovereign power.”¹²⁷ Indeed no less an authority than Richard Epstein has noted that “[o]ne constant refrain of political and constitutional history treats taxation as an inherent and indispensable power of the sovereign.”¹²⁸

If the sovereign is omnipotent in the exercise of the taxing power, surely that power extends to the selection of the method of taxation. If that is the case, it should follow that progressive taxation is a constitutionally permissible means of taxation. Even cursory research reveals that the few cases that have even tangentially addressed progressive taxation support its constitutionality.

As a starting point, in *Knowlton v. Moore*,¹²⁹ the executors of a will challenged a progressive estate tax on numerous grounds.¹³⁰ The Court dismissed all claims against the progressive rate feature of the instant tax as “without merit.”¹³¹ The Court stated that Congress had latitude to enact duties, imposts, and excises that would fall very unequally and much more heavily on some states than on others.¹³² According to the Court in *Knowlton*, the legitimacy of a tax should not be determined by its effect on individual taxpayers, but on states.¹³³

Like the individual taxpayer in *Knowlton*, Massey attacks progressive taxation because of its effect on individuals, claiming that progressive taxation violates the Takings Clause.¹³⁴ However, the Court’s earlier decision in *County of Mobile v. Kimball*¹³⁵ clearly established that taxation did not implicate the Takings Clause.¹³⁶ *Kimball* dealt with a taxpayer challenge to a county tax enacted to provide navigational improvements for

126. *Society for Savings*, 73 U.S. at 606 (citations omitted).

127. *Id.* at 604-05; see also *Cook v. Tait*, 265 U.S. 47, 54 (1924) (concluding that the power to tax extends to citizens domiciled and income derived from property situated in foreign countries).

128. Richard A. Epstein, *Taxation in a Lockean World*, 4 J. SOC. PHIL. & POL’Y 49, 49 (1986).

129. 178 U.S. 41 (1900).

130. The executors protested on three grounds. First, the provisions of the Act violated Article I, Sections eight and nine of the U.S. Constitution. Second, the legacies to certain individuals amounted to less than \$10,000, and therefore should not have been subject to a tax or duty. Third, the legacy to another individual was taxed at the wrong rate. See *id.* at 44-45.

131. *Id.* at 109.

132. See *id.* at 106.

133. See *id.* at 101.

134. See *supra* Section II.C.

135. 102 U.S. 691 (1880).

136. See *id.* at 703 (“But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution.”).

the river, bay, and harbor of Mobile, Alabama.¹³⁷ The taxpayer claimed, among other things, that the tax violated the Alabama constitutional prohibition against the taking of property for public use.¹³⁸

Although *Kimball* dealt with a local, rather than a federal tax, the discussion is instructive because the Alabama Constitution contains a Takings Clause similar to the federal language.¹³⁹ According to the Court, taxation entails a contribution to support government for which a taxpayer receives a government-provided benefit, while takings entail a forced exchange of property for its equivalent in money.¹⁴⁰ The Court saw taxation and takings as “essentially different.”¹⁴¹

The *Kimball* opinion articulated the most compelling reason why taxation is not a taking. Although taxation is, in a layman’s understanding, a taking because the government is using an individual’s money for a public purpose, it is not a *constitutional* taking triggering the protection of the Takings Clause.¹⁴² The processes of taking and taxing are not analogous and the two cannot be compared.¹⁴³

In *Society for Savings v. Coite*,¹⁴⁴ the Court also considered the constitutionality of progressive taxation in dictum. It stated:

Experience shows that [tax assessed on the basis of business volume] . . . is better calculated [than fixed sums] to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained.¹⁴⁵

137. *See id.* at 696.

138. *See id.* at 702.

139. *See Massey, supra* note 17, at 123 (“Every State has independent constitutional guarantees against the uncompensated taking of private property for public use. . . . [S]tates [are] free to assess the validity of progressive state income taxation under the state takings guarantee . . .”).

140. *See id.*

141. *Id.*

142. Earlier, in *Gilman v. City of Sheboygan*, 67 U.S. 510 (1862), Justice Swayne stated: “That clause [Takings Clause] of the Constitution refers solely to the exercise, by the State, of the right of eminent domain.” *Id.* at 513. Although Calvin Massey takes a dim view of Justice Swayne, Swayne’s opinions were supported by a majority of the Court at that time and should not be discarded merely because he was perhaps weaker, in Calvin Massey’s judgement, than other justices. Perhaps the reason that the Court has not directly considered the issue since *Brushaber* is that the opinion put the matter to rest.

143. Lower courts have never given much credit to the takings argument. *See, e.g.,* *United States v. Jones*, 877 F. Supp. 907, 912 (D.N.J. 1995) (noting that courts have “routinely rejected” arguments such as taxation being a taking under the Fifth Amendment); *Coleman v. Comm’r of Internal Revenue*, 791 F.2d 68, 70-72 (7th Cir. 1986) (dismissing a taxpayer’s takings challenge as “frivolous” and calling the taxpayer’s claims “tired arguments”).

144. 73 U.S. (6 Wall.) 594 (1867).

145. *Id.* at 608.

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At the time of this decision, the nation was experiencing its first progressive income tax.¹⁴⁶ If the Court viewed progressive taxation as unconstitutional, it seems unlikely that it would have offered such a spirited endorsement.

If *Kimball* and *Society for Savings* left open the possibility that progressive taxation was open to question, that possibility was firmly rejected in *Brushaber v. Union Pacific Railroad Co.*,¹⁴⁷ when the Court upheld the constitutionality of a progressive income tax.¹⁴⁸ The *Brushaber* Court held unequivocally that *Knowlton* foreclosed the contention that a progressive tax is an uncompensated taking.¹⁴⁹ In *Brushaber*, the Court explicitly decided, due to an apparent assertion by the taxpayers that a tax was an uncompensated taking, that the tax was not subject to the Takings Clause based on long-standing history and precedent. The Court wrote, “[this] proposition [that the progressive tax is an uncompensated taking] disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some if not all of the various income taxes enacted prior to 1894 to which we have previously adverted.”¹⁵⁰ This reiterates an assumption which is clear from the legislative history of the Sixteenth Amendment: Congress’s power to tax is presumptively constitutional.¹⁵¹

Soon after *Brushaber*, the Court again had occasion to address a challenge to the new income tax. In *Tyree Realty Co. v. Anderson*,¹⁵² a taxpayer claimed that the income tax was invalid because of, among other things, “the illegal discriminations and inequalities which it creates, including the provision for a progressive tax on the income of individuals”¹⁵³ Again, the Court declined to consider the points raised by the taxpayer inasmuch as “each [of the points] and all of them were considered and adversely disposed of in *Brushaber*”¹⁵⁴ The terse disposition is at least mildly surprising because *Brushaber* had been decided in an era when a progressive rate structure was considered radical.¹⁵⁵

The cases after *Brushaber* show that the Court has clearly proceeded under the assumption that progressive taxation is constitutionally permis-

146. See *supra* note 5.

147. 240 U.S. 1 (1916).

148. The tax in *Brushaber*—the Tariff Act of 1913, 38 Stat. 166 (enacted Oct. 3, 1913), the Income Tax of 1913—was enacted only eight months after the 36th state ratified the Sixteenth Amendment. See WITTE, *supra* note 6, at 75, 78.

149. *Brushaber*, 240 U.S. at 25 (1916).

150. *Id.*

151. See *supra* notes 120-128 and accompanying text.

152. 240 U.S. 115 (1916).

153. *Id.* at 117.

154. *Id.*

155. See Staudt, *supra* note 44, at 657.

sible. In fact, the Court has acted consistently to protect the progressive rate structure against erosion. The Court has decided many cases in which taxpayers have attempted to exploit differences in tax rates among different family members (or related entities) without questioning the differential rates themselves.¹⁵⁶ In *Lucas v. Earl*,¹⁵⁷ for example, an agreement between a husband and wife was held ineffective to attribute half of the husband's income (taxed at a high rate) to the wife (who would have been taxed at a much lower rate).¹⁵⁸ The court tacitly accepted the constitutionality of progression in the tax rates and focused instead on the process by which the taxpayer attempted to exploit the tax rate differential.¹⁵⁹ In *Lucas* and in other income splitting cases, the Court effectively protected progressive rate structures by limiting the circumstances under which a taxpayer can attribute his or her income to another.

It follows that, as a general proposition, the Supreme Court is hesitant to tread on Congress's broad power to tax.¹⁶⁰ The Court's deference to government in matters relating to taxation derives from government's dependence upon taxes to function. The "presumption of constitutionality" of any economic regulatory legislation passed by Congress restrains the Court in these circumstances.¹⁶¹ The conclusion is inescapable that the Court consistently allows the government wide latitude with regard to taxation, certainly sufficient to permit progressive taxation.

C. Limits on Taxation

Although the Court has rejected the notion that takings jurisprudence applies in the area of taxation, it has struck down taxes (albeit rarely) under other doctrines. Progressive taxation, however, is immune to all of them. The purpose of this section is to demonstrate the lengths to which the Court is willing to go to uphold taxes, as well as the reasons why it

156. See Blum & Kalven, *supra* note 11, at 431.

157. 281 U.S. 111 (1930).

158. See *id.* at 114-15.

159. See *id.* Blum and Kalven pointed out that *Lucas v. Earl* and the other "income splitting cases" were the result of progressive tax rates. Blum & Kalven, *supra* note 11, at 431.

160. See, e.g., *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 733 (1985) (affirming I.R.S.'s right to levy against entire balance of joint bank accounts of delinquent taxpayer); *United States v. Rodgers*, 461 U.S. 677, 697 U.S. (1983) (upholding the government right to sell the entire property of a delinquent taxpayer despite the property interests of innocent third parties); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 (1977) (rejecting Fourth Amendment challenge to seizure of taxpayer's property in lieu of taxes); *Phillips v. Commissioner*, 283 U.S. 589, 595-96 (1931) (affirming revenue collection by summary proceeding).

161. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). "Famous footnote four" written by Justice Stone went on to intimate that the presumption of constitutionality of economic legislation would be subjected to "more exacting judicial scrutiny" only in instances where the Constitution specifically prohibited such legislation such as restricting voting rights, freedom of expression, or political association. *Id.*

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does so.

Calvin Massey's concern regarding the tyranny of taxation is neither trivial nor unique; the Court has also recognized that the power to tax should not be unfettered. For example, the *Loan Ass'n v. Topeka*¹⁶² Court seemed aware of and genuinely afraid of the government's taxation power and the resulting ability to wreak havoc upon citizens.¹⁶³ As the Court explained, the power to tax "can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."¹⁶⁴ The *Topeka* Court recognized that a legitimate tax must strike the uneasy balance between providing the needed financial support of the government and being "sanctioned by time and the acquiescence of the people."¹⁶⁵ This uneasy balance allows taxation powers to be circumscribed under narrow circumstances.

*Brushaber v. Union Pacific Railroad Co.*¹⁶⁶ takes the classic approach, warning that a tax might fail if it were "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment."¹⁶⁷ While *Brushaber* suggests that the Takings Clause might apply to arbitrary and confiscatory taxes—which the Court has struck down consistently—it also makes clear that progressivity, in and of itself, does not invalidate a tax under the Takings Clause. Only taxes that are, in substance, criminal punishments might fall within the Takings Clause.¹⁶⁸

Brushaber is thus consistent with the idea that exactions that are exercises of the revenue function will pass constitutional muster. The proportionality or progressivity of a tax does not determine whether the tax is unconstitutionally confiscatory ("harsh or oppressive" in modern par-

162. 87 U.S. 655 (1874).

163. *See id.* at 662.

164. *Id.* at 664.

165. *Id.* at 665.

166. 240 U.S. 1 (1916).

167. *Id.* at 24-25 (1916). This same thought is articulated by the Court in any number of its tax opinions. "[W]hen the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution . . . [w]e must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) (quoting *St. Louis Southwestern R.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914)). Where Equal Protection is concerned, "inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a [tax] system that is not arbitrary in its classification, are not sufficient to defeat the law." *Id.* (quoting *Maxwell v. Bugbee*, 250 U.S. 525, 543 (1919)).

168. *See* *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 781-82 (1994) (striking down a so-called tax as being essentially punishment); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (invalidating an exaction "merely in 'the guise of a tax'").

lance). As a practical matter, this disposes of Calvin Massey's position. Still, it is worth probing further the contours of limits on the taxing power.

The modern view holds that a tax can be found invalid if it is not for a public purpose, if it serves a deterrent purpose seeking to completely bar an activity, if it is used exclusively to punish, or if it is harsh and oppressive.¹⁶⁹ Equal Protection and First Amendment concerns can also bring a tax into question.¹⁷⁰ A short discussion of these issues reveals that, even in the face of these articulated limitations, the Court is still hesitant to declare a tax unconstitutional unless it is a gross abuse of the power to tax.

1. *Public Purpose*

A basic theme of tax policy holds that taxes must be levied for a public purpose.¹⁷¹ The public is taxed "to raise money for public purposes" and not to support the private needs of individuals.¹⁷² Thus, initially, the validity of a tax should be tested by determining who benefits from the tax and whether the tax was implemented with proper authority.¹⁷³

Alexander Hamilton observed that "[t]he genius of liberty reprobates every thing arbitrary or discretionary in taxation,"¹⁷⁴ but the Court has nonetheless used its discretion to eliminate unconstitutional taxes. The Court's restraint of the government's taxation power appears to have had its genesis in *Loan Ass'n v. Topeka*.¹⁷⁵ In *Topeka*, the Court angrily struck down a tax imposed to pay for bonds "donated" to private industry without corresponding public benefit, characterizing such taxation as tantamount to "robbery."¹⁷⁶ The Court held that one of the limitations on taxation powers is that taxes must be levied for public benefit rather than designed merely to funnel tax dollars to corporations.¹⁷⁷

More recent cases suggest that the public benefit requirement of *Topeka* has diminished and that the government retains broad discretion

169. This framework is more fully described in an earlier work. See generally Leo P. Martinez, *Of Fairness and Might: The Limits of the Sovereign Power To Tax After Winstar*, 28 ARIZ. ST. L.J. 1193 (1996). For the reader's convenience, I summarize the relevant portions of that piece.

170. See *supra* text accompanying notes 201-238.

171. Hence Calvin Massey's devotion of time to argue the use of "benefits" theory to undercut progressive taxation. See Massey, *supra* note 17, at 106-08.

172. *Loan Ass'n v. Topeka*, 87 U.S. 655, 664 (1874).

173. See *id.* at 665.

174. Alexander Hamilton, *The Continentalist*, No. 6, 1782, in 3 PAPERS OF ALEXANDER HAMILTON 104 (Harold C. Syrett ed., 1962).

175. 87 U.S. 655 (1874).

176. *Id.* at 664. Of course, *Topeka* preceded our notion of the modern welfare state.

177. See *id.* at 663-64.

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to enact different types of taxes to ensure its survival.¹⁷⁸ Progressive taxation meets the test requiring that it be levied for a public purpose. It is imposed on every member of the public for the common good, including such functions as national defense and social welfare programs.¹⁷⁹ It is not imposed to benefit any private enterprise or to “build up private fortunes.”¹⁸⁰

2. *Deterrent Taxes*

A tax that deters an activity will be upheld unless deterrence is its exclusive purpose. A tax cannot be used to bar an activity, but taxes that discourage or make an activity difficult or expensive have been upheld by the Court.¹⁸¹ In deference to the taxing authority, the Court will often search for means to label a tax as a “revenue generation” operation, thereby making deterrence merely a side effect of the tax.¹⁸²

According to the Court, legitimate taxes “generate revenues, impose fiscal burdens on individuals, and deter certain behavior.”¹⁸³ The amount of a tax does not appear to be a factor which the Court chooses to focus on—sometimes even if an excessive amount demonstrates a deterrent purpose. In fact, the Court has expressed the idea that even a tax with a particularly steep rate or an “obvious deterrent purpose” does not necessarily evince an inappropriate use of the power to tax.¹⁸⁴ So long as reve-

178. In *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947), the Court explained that *Topeka* was simply one of the “rare instances” in which the Court struck down a tax on such grounds, a “far reaching authority [which] must be exercised with the most extreme caution. Otherwise, a state’s power to legislate for the public welfare might be seriously curtailed Changing local conditions . . . may lead a state . . . to believe that laws . . . are necessary to promote the general well-being of the people.” *Id.* at 6-7; see also *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983) (“[L]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.”).

179. Progressive taxation is itself a kind of welfare program. See Bankman & Griffith, *supra* note 33, at 1945-67 (citing distributive justice as a goal of progressive taxation).

180. *Topeka*, 87 U.S. at 664 (1874).

181. See, e.g., *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

182. According to dissenting Chief Justice Rehnquist, “taxes are customarily enacted to raise revenue to support the costs of government” but also “may be enacted to deter or even suppress the taxed activity.” *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 787 (1994) (Rehnquist, C.J., dissenting).

183. *Id.* at 778.

184. *Id.* at 780. In *Kurth Ranch*, the Court struck down a Montana drug tax statute that imposed a tax on the possession and storage of dangerous drugs *after* defendants were arrested on drug charges. See *id.* at 784. The Department of Revenue attempted to collect almost \$900,000 in taxes from the Kurths, independent of any criminal penalties. See *id.* at 773. The Court found the Montana statute unconstitutional because it placed the Kurths “in jeopardy a second time ‘for the same offense.’” *Id.* at 784. This was the first time the Supreme Court held that a tax violates the Double Jeopardy Clause of the Constitution. See *id.* at 780-81 (citing U.S. CONST. amend. V). Notably, the tax liability in *Kurth Ranch* was nearly eight times the value of the marijuana seized, obviously a deterrent tax, yet this was not the basis for the statute’s unconstitutionality. See 511 U.S. at 767.

nue generation can be labeled as the main purpose for the tax, the high rate and the deterrent effect will likely be disregarded.

Although progressive taxation features steeper rates at higher incomes, nobody seriously argues that these rates were enacted specifically to deter individuals from generating additional gross income.¹⁸⁵ Revenue generation is clearly the purpose of the general income tax. The limitations on deterrent taxes simply do not apply to progressive taxation.

3. Punitive Taxes

Legislatures cannot use tax laws as tools to inflict punishment or assess penalties. A tax imposed with punishment as the obvious goal will likely be found to be an abuse of the legislature's taxing authority. Taxes with punitive characteristics are closely scrutinized by the Court, which has evidenced reluctance to allow a punitive tax to pass constitutional muster.

A punitive tax was ruled unconstitutional in *Department of Revenue v. Kurth Ranch*.¹⁸⁶ In *Kurth Ranch*, the Court struck down a drug tax because it was "imposed on criminals and no others, [and] depart[ed] far from normal revenue laws as to become a form of punishment."¹⁸⁷ Thus, when taxes become punitive the Court will not allow them to be imposed: "[T]here comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."¹⁸⁸ "[J]ustifications [for such a tax] vanish when the activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction."¹⁸⁹ Under the *Kurth* formulation, a tax is also inappro-

185. It could be suggested that progressive income taxes deter higher-income individuals from working beyond a marginal point, and that the progressive rates are a deterrent to work. However, taxes that suppress certain activities have been upheld by the Court, for every tax in some way regulates an activity and "[t]o some extent . . . interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, 300 U.S. at 513 (1937).

186. 511 U.S. 767 (1994).

187. *Id.* at 784. That the tax was labeled civil rather than criminal was of no moment: a tax subsequent and in addition to criminal penalties is inappropriate if its purpose "may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 777 (citing *United States v. Halper*, 490 U.S. 435, 448-49 (1989)).

188. *Id.* at 780 (quoting *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)). The proposition that taxes are inappropriate if used as penalties is in accord with the opinion of some scholars who assert that "one is obligated to pay only those taxes that are not penal in nature," i.e., imposed for the commission or omission of an act. See Robert W. McGee, *Is Tax Evasion Unethical?*, 42 KAN. L. REV. 411, 417 (1994) (citing REV. MARTIN T. CROWE, *THE MORAL OBLIGATION OF PAYING JUST TAXES*, DISSERTATION, THE CATHOLIC UNIVERSITY OF AMERICA STUDIES IN SACRED THEOLOGY NO. 84, at 75 (1944)).

189. *Kurth Ranch*, 511 U.S. at 782; see also *id.* at 791 (Rehnquist, C. J., dissenting); *id.* at 792-794 (O'Connor, J., dissenting) (stating that "the power to tax illegal activity carries with it the

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proportionately punitive if it serves an apparent purpose that is “arbitrary” or “shocking.”¹⁹⁰ Progressive taxation, however, exists to apportion the tax burden among those who are able to pay, and it is not designed to punish taxpayers, even high-income taxpayers.¹⁹¹

Kurth relied heavily on the ideas expressed in *United States v. Halper*,¹⁹² a case decided in 1989 that set out a test for determining whether a sanction is punitive. In 1997, in *Hudson v. United States*,¹⁹³ the Court abrogated *Halper* on the basis that the *Halper* test “has proved unworkable” by placing too much emphasis on the deterrent effect of the sanction.¹⁹⁴ With part of *Kurth*’s underpinning seemingly eroded, the possibility that a punitive effect of a particular progressive will render the tax improper becomes even more remote.

4. Harsh and Oppressive Taxes

A tax law that operates in a harsh or oppressive manner toward individuals or groups of individuals also lacks legitimate authority. Although progressive taxation, in theory, could become confiscatory if an ultra-steep rate were imposed on a few individuals,¹⁹⁵ the Court has often traveled some distance to uphold a tax that at first glance appeared to be harsh and oppressive.

For example, a retroactively applied tax could be seen as harsh and oppressive. However, the Court upheld such a tax in *United States v. Carlton*.¹⁹⁶ In *Carlton*, the executor of an estate engaged in a transaction resulting in over a half-million dollar loss in order to take advantage of an estate tax deduction. The IRS disallowed the deduction, based on a re-

danger that the legislature will use the tax to punish the participants for engaging in that activity,” and “a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective”).

190. *Id.* at 791 (Rehnquist, C.J., dissenting). In its articulation of the constitutional standard, the *Kurth Ranch* Court employs an “arbitrary” or “shocking” standard that is arguably the equivalent to that of *Carlton*’s “arbitrary or irrational” and “harsh and oppressive” standard. See *United States v. Carlton*, 512 U.S. 26 (1994).

191. The progressivity of the federal estate and gift tax is intended to deter taxpayers from amassing great wealth, thereby discouraging undesirable economic stratification. See *Hudson*, *supra* note 27 at 27 (1983) (citing S. REP. NO. 144-97 at 124, reprinted in 1981 U.S.C.C.A.N. 105, 226). For a more provocative stance, see Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990) (advocating, essentially, a 100 percent rate of taxation on wealth transfers).

192. 490 U.S. 435 (1989).

193. 522 U.S. 93, 118 S. Ct. 488 (1997).

194. See *id.* at 494.

195. See Massey, *supra* note 17, at 104-105 (arguing that a 100 percent tax imposed on Bill Gates would be subject to the Takings Clause). Such a tax would be invalidated as “harsh and oppressive” under established case law rather than struck using the Takings Clause. Although the effect is the same, the Court appears comfortable with the “harsh and oppressive” approach and has already held that the Takings Clause has no application in taxation questions.

196. 512 U.S. 26 (1994).

cent tax law amendment that retroactively eliminated the deduction. The Court rejected Carlton's claim of reliance and detriment and upheld the retroactive tax as constitutional.¹⁹⁷ The Court contended that because taxes are within the "sphere of economic policy," the "harsh and oppressive" test for the validity of retroactive tax legislation is the same as the "arbitrary and irrational" test generally applicable to economic legislation.¹⁹⁸ A retroactive tax will be upheld, like any other retroactive economic legislation, if it "is supported by a legitimate legislative purpose furthered by rational means."¹⁹⁹

There is a distinction to be drawn between unconstitutionally confiscatory (read "harsh and oppressive") tax rates and differential taxation. Calvin Massey's vision seems to blend these ideas. He claims that "[s]urely an income tax of 100% imposed on a single individual—for example, Bill Gates—[is subject to the Takings Clause, so] why does the problem disappear when the [tax] applies to the 2.5 million highest income earners in the nation?"²⁰⁰ While a confiscatory progressive tax may be subject to attack, even a proportional tax might be subject to a claim that it borders on the unconstitutionally confiscatory. The fact that a tax happens to be confiscatory does not mean that a proportional or "flat" tax is necessarily favored.

5. *Equal Protection*

The Court has not overlooked the possibility that taxation might lead to violations of the Equal Protection Clause. However, the Court has shown difficulty developing clear indicators of an equal protection violation. The need for broad powers of taxation, as well as the impracticality of exacting the same contribution from every individual, has led the Court to narrow its use of the Equal Protection Clause when considering taxation. The Court has felt safe to strike a tax for equal protection reasons only when legislatures tax similarly situated entities differently. The cases follow a predictable pattern. Those cases that provide relief against a tax scheme are those in which horizontal equity is violated.²⁰¹ On the other hand, cases involving issues of vertical equity usually are decided in favor of the government.²⁰²

197. *See id.* at 34-35.

198. *Id.* at 30. Courts also "defer to legislative judgment as to the necessity and reasonableness of [the] particular measure." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977) (citing *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945)).

199. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

200. Massey, *supra* note 17, at 104-105.

201. *See, e.g.*, *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881-83 (1985).

202. *See, e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 298-300 (1997); *Magoun v. Illi-*

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Notwithstanding the notion that fairness and equity limit the power to tax, the Court has made it clear that differential taxation schemes are not unconstitutional. Despite the existence of tax rate differentials, progressive tax schemes have survived in the cases that have considered vertical equity as the prime issue.²⁰³ These cases contain explicit pronouncements that a progressive tax does not violate the Equal Protection Clause of the Constitution. The Court has upheld differential taxation schemes as constitutional, stating, “[a] tax which affects the property within a specific class is uniform as to the class, and there is no provision of the constitution which precludes legislative action from assessing a tax on that particular class.”²⁰⁴

In *Brushaber*, the Court rejected the contention that the tax at issue violated substantive due process by differentiating between the powers of taxation and the limits of due process. Chief Justice White wrote that “it is . . . well settled” that the Due Process Clause of the Fifth Amendment

is not a limitation upon the taxing power conferred upon Congress by the Constitution; . . . the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause.²⁰⁵

The same antipathy to limiting taxation powers is seen in *Lunding v. New York Tax Appeals Tribunal*,²⁰⁶ in which the Court used a test derived in *New Hampshire v. Piper*²⁰⁷ to strike a New York income tax which disallowed nonresidents a deduction for alimony.²⁰⁸ In striking down the tax scheme, the Court stated that the Privileges & Immunities Clause²⁰⁹ “[a]ffords no assurance of precise equality in taxation between residents and nonresidents of a particular State.”²¹⁰ However, the Court stated that the New York tax did not meet the burden of proving that “[i] there is a substantial reason for the difference in treatment; and (ii) the discrimina-

nois Trust & Sav. Bank, 170 U.S. 283, 311-12 (1898).

203. See, e.g., *Magoun*, 170 U.S. at 300-01. An Illinois inheritance statute set up three classifications of persons who were differentially taxed. See *id.* at 285. The statute classed heirs and devisees into three tax classes based upon their blood relationship to the decedent; close relatives, more distant relatives, and “strangers to the blood” of the decedent. See *id.* at 286. The rates were progressive among the categories. The statute also treated one classification differently based upon the amount of inheritance. See *id.* at 285-286. The “stranger-to-the-blood” class was progressively taxed based upon the value of the inheritance. See *id.* The rates progressed from three dollars per one hundred dollars of inheritance on amounts under ten thousand dollars up to six dollars per one hundred dollars of inheritance if the amount exceeded fifty thousand dollars. See *id.*

204. *Id.* at 297.

205. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916).

206. 522 U.S. 287 (1998).

207. 470 U.S. 274 (1984).

208. See *Lunding*, 522 U.S. at 298 (citing *New Hampshire v. Piper*, 470 U.S. 274, 284 (1984)).

209. U.S. CONST. art. XIV, § 1.

210. *Lunding*, 522 U.S. at 297.

tion practiced against nonresidents bears a substantial relationship to the State's objective."²¹¹ Again, a successful challenge was predicated upon horizontal equity, the different treatment of similarly situated taxpayers.

Not all such cases raise the bar as high. For example, in *General Motors Corp. v. Tracy*,²¹² an Ohio tax that exempted natural gas local distribution companies (LDC's) from sales and use taxes was held not to violate the Equal Protection Clause.²¹³ In denying General Motors, a buyer of out-of-state natural gas, tax relief based upon an Equal Protection claim, the Court stated that "[s]tate tax classifications require only a rational basis to satisfy the Equal Protection Clause."²¹⁴ The Court flatly upheld the power to tax differentially. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification."²¹⁵

Nordlinger v. Hahn,²¹⁶ in which the Court assessed the constitutionality of a California property tax scheme that created dramatic disparities between taxpayers owning relatively similar properties, represents the zenith of the power to tax. Through this acquisition value assessment scheme, a long-time homeowner's property tax was based on an essentially frozen 1975-76 tax year value, with an inflationary cap not to exceed 2%.²¹⁷ The Court noted that Nordlinger, as a 1989 purchaser of a "modest" Los Angeles home worth \$170,000, had a "general tax levied against her modest home . . . only a few dollars short of that paid by a pre-1976 owner of a \$2.1 million Malibu beach front home."²¹⁸ In view of such disparity, Nordlinger claimed California's tax scheme violated the Equal Protection clause in that such a tax was "arbitrary or irrational."²¹⁹

After analyzing California's scheme of property taxation that explicitly favored long-time homeowners, the *Nordlinger* Court recognized that taxes may reflect a state's belief that one taxpayer's expectations are "more deserving of protection" than those of another taxpayer.²²⁰ Remarkably, both the *Nordlinger* dissent and majority explicitly conceded that this system of taxation is discriminatory and unfair. Justice Stevens, in his dissent, referred to California long-time homeowners as "squires" and said such tax law creates "a privilege of a medieval character: Two families with equal needs and equal resources are treated differently

211. *Id.* at 298.

212. 519 U.S. 278 (1997).

213. *See id.* at 282-83, 312.

214. *Id.* at 311 (citations omitted).

215. *Id.* at 311 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

216. 505 U.S. 1 (1992).

217. *See id.* at 5 (citing CAL. CONST. art. XIII A).

218. *Id.* at 7.

219. *Id.* at 11.

220. *Id.* at 13.

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solely because of their different heritage.”²²¹ But the majority refused to invalidate the tax even though it characterized it as a “grand experiment [that] appears to vest benefits in a broad, powerful, and entrenched segment of society, and . . . ordinary democratic processes may be unlikely to prompt its consideration or repeal.”²²²

By allowing the tax, which it described as discriminatory and unfair, it appears that the Court merely pays lip service to its earlier warning of dire consequences from taxes that transfer wealth from one class to another.²²³ When it comes to taxes, the Court will not “second-guess[] state tax officials.”²²⁴ Even in cases of multiple taxation, the rights of taxpayer citizens must yield to “tax uniformity” and “state autonomy.”²²⁵ If the Court is willing to endorse even cases of multiple taxation, it is fairly clear that it will uphold progressive taxation as a valid exercise of the sovereign’s powers.

By contrast, taxpayers who have challenged tax schemes on horizontal equity grounds have fared much better. In *Metropolitan Life Insurance Co. v. Ward*,²²⁶ an Alabama statute that imposed dramatically different tax premiums on domestic and out-of-state insurance companies was challenged on equal protection grounds.²²⁷ The gross disparity in tax premiums among similarly situated taxpayers, an attempt by Alabama to bolster the creation of domestic insurance companies within the state,

221. *Id.* at 29-30 (Stevens, J., dissenting).

222. *Id.* at 18.

223. *See* *Loan Ass’n. v. Topeka*, 87 U.S. 655, 664 (1874) (warning that the taxation power “can readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other”).

224. *Nordlinger*, 505 U.S. at 25 (Thomas, J., concurring). *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994), is also consistent with the Court’s reluctance to substitute its judgment as to tax officials’ views of the limits of taxation power. In *Barclays*, the Court upheld California’s imposition of a franchise tax using a “worldwide combined reporting” method. *See id.* at 303-04. Corporations operating in California were required to aggregate the income of their parent corporations, affiliates, and subsidiaries, including entities operating in other states and foreign countries. The state then taxed a percentage of the *worldwide income* equal to the average proportion of worldwide payroll, property, and sales in California. *See id.* at 304-05 (citing CAL REV. & TAX. § 25128 (West 1992)). Once the average percentage was determined, that percentage of the total income of the large corporate entity as a whole would determine the tax liability for the subsidiary. For example, in the first of the consolidated cases, the state used the income of Barclays Group, a multinational banking enterprise composed of over 220 corporations, to determine the tax liability for two independent members operating in California. The state found that the two members were part of a “worldwide unitary business,” and assessed them approximately \$153,000 in additional tax liability. *See id.* at 308. Although petitioners pointed out and the Court acknowledged that upholding the state’s power to tax meant that some taxpayers were at risk for or would be subject to “multiple international taxation,” the Court was still willing to uphold the tax as an inherent state power. *See id.* at 317-20.

225. *Id.* at 330-31.

226. 470 U.S. 869 (1985).

227. *See id.* at 871.

was viewed dramatically differently by opposing members of the Court.²²⁸

Still, even those few cases that hold a tax unconstitutional demonstrate the extreme reluctance to intrude into governments' power to tax despite obvious circumstances of inequity and oppression. Although the tax in *Metropolitan Life* was held unconstitutional because of the discrimination against the foreign corporations and Equal Protection violations, a strong dissent by four of the justices criticized the majority's decision as "astonishing" and "unsupportable by precedent."²²⁹ In her dissent, Justice O'Connor contradicted the majority's opinion with a discussion that "long established jurisprudence" required the Court to defer to the judgment of the legislature so long as the classification for the differential tax was "rationally related to a legitimate state purpose."²³⁰ Remarkably, the strength of the taxing power led four members of the Court to uphold the power of the sovereign, notwithstanding stark equal protection concerns.

In theory, progressive taxation cannot violate horizontal equity because all similarly situated taxpayers are treated equally. At the same time, a progressive tax treats dissimilarly situated taxpayers differently. Thus, objections that progressive taxation does not treat people equally are sound. However, the Court will not use the Equal Protection Clause to strike a progressive tax unless it somehow results in a violation of horizontal equity.

Calvin Massey's challenge essentially questions the validity of vertical equity as a goal and progressive taxation as a means by which to achieve it. He frames his arguments, however, in the guise of horizontal equity, that is, equal treatment of similarly situated taxpayers. The difficulty with his position is that while the Court has, albeit reluctantly, afforded some relief for violations of the principle of horizontal equity, it has been loathe to use Equal Protection doctrine to disallow taxes that seek to achieve vertical equity. Simply, the Court allows taxation schemes to treat differently situated taxpayers differently. The cited cases demonstrate that the Court is forced to repel any challenge to government discretion to tax, especially where the challenge focuses on economic disparity.

228. *See id.* at 882-83. The domestic companies in *Metropolitan Life* were paying a tax premium of only one percent on all types of insurance, while the foreign companies were charged a rate of three percent on gross life insurance premiums received within the state and four percent on other types of insurance. *See id.* at 871.

229. *Id.* at 883 (O'Connor, J., dissenting).

230. *Id.* at 884 (O'Connor, J., dissenting).

6. *First Amendment Concerns*

The use of constitutional doctrine apart from takings jurisprudence has not been fruitful for the taxpayer seeking to invalidate taxing schemes. Taxpayers have succeeded only in those situations where an affirmative constitutional right is directly implicated. For example, the First Amendment can, in some circumstances, override the taxing power. In *Arkansas Writers Project, Inc. v. Ragland*,²³¹ for example, the Supreme Court held that an Arkansas sales tax on general interest magazines, which exempted magazines classified as religious, professional, trade, or sports journals, violated the First and Fourteenth Amendments.²³² The result is consistent with the theme of guarding against violations of horizontal equity inasmuch as similarly situated taxpayers are treated differently. The single medium of magazines is subject to different rates of taxation based on content.

Where the “discrimination” in taxation is not content-based, however, the Court allows relatively constraint-free taxation, even when a fundamental right such as freedom of speech is at stake. In *Leathers v. Medlock*,²³³ the Court upheld the government’s relatively unlimited ability to differentially tax. An Arkansas sales tax on cable television, with an exemption for other media such as newspapers, was found not to violate the First Amendment because the tax was not aimed at the cable company’s First Amendment activities and the tax was not content-based.²³⁴ Asserting that the legislature has “especially broad latitude” when it comes to the creation of tax classifications, the Court stated: “Inherent in the power to tax is the power to discriminate in taxation.”²³⁵

This pattern replicates that found in the equal protection context. While there is a demonstrable tendency of the Court to protect the principle of horizontal equity (that is, similarly situated taxpayers should be treated equally), there is nonetheless the reality that taxpayers making challenges to the vertical equity of taxation schemes do not receive the same protection. By contrast, where the goal of horizontal equity is not met, the Court has been quick to invalidate a tax, resorting to the dor-

231. 481 U.S. 221 (1987).

232. *See id.* at 229. “[T]he basis on which [the Arkansas tax] differentiates between magazines is particularly repugnant to First Amendment principles: a magazine’s tax status depends entirely on its content.” *Id.*

233. 499 U.S. 439 (1991).

234. *See id.* at 444.

235. *Id.* at 451. However, *see Minneapolis Star & Tribune Co. v. Minnesota Comm’r. of Revenue*, 460 U.S. 575, 579 (1983), in which the Court held that the “use tax” on the cost of paper and ink products enacted by Minnesota violated the First Amendment because it singled out the press as a whole and because it provided exemptions to a small group of newspapers in particular. The Court feared that to vest this type of power in the state would allow it indirectly to regulate and suppress the press. *See id.* at 585; *Ragland*, 481 U.S. at 221.

mant commerce clause²³⁶ or to the supremacy clause.²³⁷

The resolution of conflicts involving the power to tax and some affirmative right (such as First Amendment rights) not so closely associated with the mechanics of the taxing power (such as the Fifth Amendment takings provision) harmonize with an unfettered power to tax.²³⁸ The extreme reluctance to second-guess the taxing authorities apparent in *Nordlinger*, supported by language in the other cases, reveals the Court's support for the proposition that taxes play a vital role in the existence and functioning of government. For the sake of preserving this vital power to tax and the government's financial well-being, the Court appears willing to defer to sovereign taxation powers and to sacrifice taxpayer conceptions of fairness, even if this means allowing the government to shift its tax burdens and benefits in ways that appear discriminatory and unfair. The theme of deference to legislative power is a constant. It carries through the Court's opinions on all tax matters, and it would carry through in a takings challenge to progressive taxation.

7. Conclusion

Calvin Massey's analysis of *Brushaber* and his assertion that progressive taxation is a denial of equal protection are both misplaced. In his analysis of *Brushaber*, he claims that one sentence of the opinion shows that the Fifth Amendment controls the taxing power and that the Takings Clause could be used to invalidate a tax.²³⁹ The sentence reads:

And no change in the situation here would arise even if it be conceded, as we think it must be that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the

236. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-583, 595 (1997) (invalidating a tax exemption for charitable institutions operated principally for the benefit of the residents of Maine as discriminatory against charitable institutions that mostly benefit nonresidents); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-33, 346-47 (1996) (invalidating North Carolina's "intangibles tax" differentially taxing residents based upon the percentage of taxable income derived in state by a corporation in which the taxpayer holds stock); *Assoc'd Indus. of Missouri v. Lohman*, 511 U.S. 641, 647-54 (1994) (invalidating a Missouri "use" tax on property stored, used or consumed in state but purchased out of state because the property was exempt from state sales tax); *Oregon Waste Systems, Inc. v. Department of Env'tl. Quality of the State of Oregon*, 511 U.S. 93, 108 (1994) (invalidating an Oregon surcharge that charged a higher per ton rate on solid waste dumped in state if generated out of state).

237. See, e.g., *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 815-17 (1989) (invalidating a Michigan tax that exempted recipients of state and local retirement income from state income tax but not recipients of federal retirement incomes); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397-99 (1983) (invalidating a Tennessee bank tax that taxed income derived from interest on U.S. securities but exempted interest income derived from state and local securities).

238. See, e.g., *Chapman v. Pac. Tel. & Tel. Co.*, 613 F.2d 193, 197 n.2 (9th Cir. 1979).

239. See Massey, *supra* note 17, at 101.

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same in violation of the Fifth Amendment²⁴⁰

Although cryptically written, the sentence more likely suggests that, like the due process clause of the Fifth Amendment, the Takings Clause does *not* apply to an ordinary progressive income tax. This statement instead is consistent and, for my purposes, coextensive with the “harsh or oppressive” limitation on the power to tax, progressively or otherwise.²⁴¹ The sentence adds nothing to the current landscape of tax limitation jurisprudence and seems a slender reed upon which to support a “takings”-inspired attack on progressive taxation.

Even if Calvin Massey could support his contention that *Brushaber* is ambiguous, the *Tyree Realty Co.* Court clearly saw, as I do, that *Brushaber* intended to dispose of the argument that progressive taxation is unconstitutional. If the Court intended to open the door to attacks on progressive taxation in *Brushaber*, it is surprising that, in all the subsequent opportunities presented, it has not followed that path. It strains credulity to believe that, if *Brushaber* did not foreclose the inquiry, the Court would so repeatedly protect the unconstitutional.

IV. IF IT AIN'T BROKE, DON'T FIX IT

The preceding has demonstrated that Calvin Massey's core proposition is wrong. The Supreme Court has explicitly considered the constitutionality of progressive taxation in the context of the Takings Clause, the First Amendment, the Due Process Clause, and the Equal Protection Clause, and in each instance the Court has shown that progressivity in and of itself is not constitutionally infirm.

This Part refutes Massey's attack on benefits theory and sacrifice theory to discredit progressive taxation. It also illustrates that pragmatism must inform the debate. The result is a jurisprudential approach to taxation that results in extreme deference to legislative decision-making. Finally, it shows that many of Massey's reasons for supporting proportional taxation fall prey to the same criticisms that he levies against progressive taxation.

A. *Benefits Theory/Sacrifice Theory*

Massey believes that support for progressive taxation relies on a bankrupt “benefits theory”—which states that the benefit derived from government is, or should be, equivalent to the value of the taking.²⁴² For

240. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24-25 (1916).

241. See *supra* notes 166 -167 and accompanying text.

242. See Massey, *supra* note 17, at 105-06.

similar reasons, he attacks “sacrifice theory”—the basic assumption that money has declining marginal utility with increasing wealth.²⁴³ However, neither set of arguments supports his position to the extent he claims.

According to Massey, benefits theory cannot justify progressive taxation unless the benefits derived from government are ever-increasing along with the tax burden—a proposition that he finds indefensible.²⁴⁴ However, Massey’s application of benefits theory to progressive taxation is inapt because it ignores any legitimate government role in the redistribution of wealth or in the allocation of resources.²⁴⁵

The Supreme Court has acknowledged that there may be legitimate and rational policy reasons to deny one taxpayer a tax-connected benefit in favor of another taxpayer, including “local neighborhood preservation, community, and stability.”²⁴⁶ For example, the Court in *Loan Ass’n v. Topeka*²⁴⁷ acknowledged that the power to tax for lawful purposes should be unlimited.²⁴⁸ Such unrestrained power to tax was justifiable according to the Court, because “in most instances . . . [such as for] the support of the government, the prosecution of war, the National defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.”²⁴⁹ The same logic applied in *Knowlton*, where the progressivity of the estate tax was upheld with the further observation that “it transgresses no express limitation in the Constitution.”²⁵⁰

The second reason benefits theory does not work in the context of progressive taxation is because the “return” to the taxpayer is, at best, difficult to measure.²⁵¹ Progressive theorists are the first to concede that precise equality in taxation is as elusive as it is desirable.²⁵² If the return to

243. See *id.* at 107-10.

244. See *id.* at 106-07. Epstein’s approach likewise examines whether progressive income taxation satisfies the public use requirement by providing in-kind compensation. See EPSTEIN, *supra* note 13, at 283-85, 295-305. Because wealth is accumulated by the government through taxes and distributed to individuals through services from the government, and because each member of the public is not provided equivalent in-kind compensation for the tax dollars that have been “taken” from them, the public use requirement is not met. See *id.* at 308.

245. See Joel Slemrod, *Introduction to TAX PROGRESSIVITY AND INCOME INEQUALITY 2* (Joel Slemrod ed., Cambridge University Press 1994).

246. *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

247. 87 U.S. (20 Wall) 655 (1874).

248. See *id.* at 663.

249. *Id.*

250. *Knowlton v. Moore*, 178 U.S. 41, 109 (1900).

251. See *Dane v. Jackson*, 256 U.S. 589, 598 (1921) (“[T]he system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers”); *Tappan v. Merchants’ Nat’l Bank*, 86 U.S. (19 Wall.) 490, 504 (1873) (“Absolute equality in taxation can never be attained.”); Slemrod, *supra* note 245, at 2.

252. See *Tappan v. Merchants’ Nat’l Bank*, 86 U.S. (19 Wall.) 490, 502-04 (1873).

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the taxpayer is elusive, little headway can be made in undercutting progressive taxation on the basis of benefits theory.

Massey's argument against benefits theory is further misleading because most supporters of progressive taxation do not rely on benefits theory to defend progressivity.²⁵³ Nonetheless, if one is inclined to rely on benefits theory to support progressive taxation, several strong arguments exist in its favor. First, the economic cost of benefits received should not be the sole measure of benefit.²⁵⁴ The intangible well-being represented by economic and social stability are perhaps most valuable to the wealthy.²⁵⁵ Second, the poor undoubtedly fare relatively better (i.e. receive disproportionately high benefits) even under a proportional system of taxation because welfare benefits likely far outweigh tax liability.²⁵⁶ No one suggests dismantling the tax system because legislatures are improperly altruistic. Finally, government services and benefits tend to be better in wealthier neighborhoods.²⁵⁷ The rich are better off. It matters little that an exact relationship between benefits and pain is difficult to discern if benefits increase at an increasing rate with income.²⁵⁸

Massey's assault on sacrifice theory also takes aim at the difficulty of measurement. Just as benefits theory cannot calculate the exact benefit each taxpayer receives, sacrifice theory cannot put a numerical value on a person's sacrifice.²⁵⁹ Professor Bittker, a supporter of progressive taxation, also recognized the deficiency: "[I]f these ideas are relentlessly subjected to rigorous analysis, they have shortcomings. . . . [W]e cannot know—other than by intuition—whether [taxpayers'] 'sacrifices' are equal."²⁶⁰ However, for Bittker, this criticism should not strengthen the case for proportional or "flat" taxation.²⁶¹ The failure to quantify sacrifice also means that no one can disprove sacrifice theory. In the debate between progressive taxation and proportional taxation, the ambiguity of sacrifice theory would only support proportional taxation if it were entitled to a presumption of fairness. As Bittker recognizes, that would be inappropriate.²⁶²

253. See Slemrod, *supra* note 245, at 2.

254. Kornhauser, *supra* note 42, at 492.

255. See *id.* at 493; Bittker, *supra* note 44, at 240.

256. Kornhauser, *supra* note 42, at 492 n.98.

257. See *id.* at 494.

258. See *id.* at 495; Bittker, *supra* note 44, at 243.

259. See Massey, *supra* note 17, at 108. "[I]t is by no means certain that money has declining utility. Those who make the claim are far more likely to have an income of \$50,000 than an income of \$10 million." *Id.* at 109.

260. Bittker, *supra* note 44, at 234.

261. See *id.* at 235.

262. See *id.*

B. Pragmatism

Notwithstanding the foregoing, my judgment is that neither the philosophical underpinnings of benefits theory nor sacrifice theory matter. This is not to say that the inquiry is not a useful one; rather both must yield to pragmatism. Two points will illustrate what I mean.²⁶³

First, the current income tax, with its system of deductions, exemptions, and credits, undercuts the possibility of ever establishing a constitutional norm of taxation that yields perfect equality.²⁶⁴ The moral war over the fairest method of taxation cannot be fought on a constitutional battlefield. Perhaps nothing more needs to be said.

The primary difficulty in characterizing progressive taxation as a taking is that there is no benchmark by which to measure what is permissible within the sovereign's power to tax and what is proscribed as unconstitutional under the Massey model. If one cannot prove that proportional taxation is the preferred constitutional norm of taxation, then one has no ground from which to attack progressive taxation. Even the Kemp Commission, which studied and then advocated a flat system of taxation, declined to set an optimal rate of flat taxation.²⁶⁵

Although Calvin Massey describes the impermissible taking aspect of progressive taxation in terms of what is "disproportionate," in reality a determination of "proportionality" is an impossible task. One might attempt an estimate of the ideal rate by accounting for income earning levels and projected government expenditures, but it is obvious that the amount of expenditures government might make is open to some fluctuation. If one cannot define the constitutional norm of taxation, then one necessarily is left at sea in terms of defining unconstitutional deviations from the norm.²⁶⁶

Massey implicitly accepts this objection by recognizing that a flat rate would apply only above a certain threshold income.²⁶⁷ To be fair, he argues that a system of taxation should exempt that amount of income required to supply necessities.²⁶⁸ While his policy reasoning is sound, al-

263. What follows is not so much a defense of progressive taxation as it is a defense of the government's power to tax progressively.

264. See generally Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989) (discussing the inherent difficulties of identifying normative bases for measuring horizontal equity).

265. See William G. Gale, *The Kemp Commission and the Future of Tax Reform*, 70 TAX NOTES 717, 718 (1996).

266. See Bittker, *supra* note 44, at 234-35.

267. The flat tax advanced by Republican presidential hopeful Steve Forbes in 1996 also contained this same kind of tax exclusion. See Gale, *supra* note 265, at 722.

268. This is really a variation of the idea that even the taxing sovereign cannot obtain blood from taxpaying turnips. It is a feature of the flat tax proposals. See HALL ET AL., *FAIRNESS AND EFFICIENCY IN THE FLAT TAX* 4 (1996) observing:

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lowing an exemption necessarily perverts the doctrinally pure concept of proportional taxation.²⁶⁹

Just as Massey takes issue with a progressive system, a proportional tax is subject to many of the same criticisms. As Professor Bittker once observed, “proportionality is no more entitled to a presumption of fairness than progression”²⁷⁰

There is no irreproachable reason why differential income justifies differential tax payments, even if rates are the same for all. One might make a case for a so-called “head tax” in which each person pays exactly the same tax. A requirement that each living person pay a fixed amount of tax might be the essence of fairness inasmuch as each person would be taxed identically without regard to station in life.²⁷¹ Only with such a system, the mantra would go, could we be free to excel (if excellence is measured in income) without being held back by the effects of taxation. Once a taxpayer has met the amount of the head tax, each additional dollar should be free of any claim by the fisc.

Massey notes that nobody advocates such a tax because, among other reasons, it is quite regressive.²⁷² I agree. To be doctrinally pure, however, whenever a tax deviates from the constitutional norm, whether labeled progressive or regressive, it should be unconstitutional under the Massey approach. His difficulty is that any system of taxation is subject to the same logical attack.²⁷³ It is perhaps no accident that the Constitution only requires “just” compensation, not “equal” or “proportional” compensation. In the end, Calvin Massey’s suggestion that progressive taxation can be a “taking” is insupportable because it is antithetical to the sovereign power to tax as a basic matter of policy.

Second, equity is influenced by other considerations. The existence of deductions, exemptions, and credits illustrates the point. Disparities be-

Although sales and value-added taxes generally are a form of consumption tax, we reject them for their lack of progressivity. The current federal tax system avoids taxing the poor, and we think it should stay that way. Exempting the poor from taxes does not require graduated tax rates rising to high levels for upper-income taxpayers. A flat rate, applied to all income above a generous personal allowance would provide progressivity without creating important differences in tax rates.

269. Massey explicitly recognizes this aspect of his system. See Massey, *supra* note 17, at 87; see also O’Kelley, *supra* note 46, at 728 (1985) (arguing that introducing exemptions into a flat tax makes it progressive).

270. Bittker, *supra* note 44, at 233.

271. For a more in-depth discussion of this concept, see Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1913 (1987).

272. Massey, *supra* note 17, at 87; see also Joel Slemrod, *Do We Know How Progressive the Income Tax System Should Be?*, 36 NAT’L TAX J. 361, 363 (1983) (theorizing about, but not advocating, zero marginal tax rates for high-income taxpayers).

273. See, e.g., Bittker, *supra* note 44, at 233-34 (“In short, the case for every tax base and every rate schedule is ‘uneasy’ . . .”).

tween equal income earners are acceptable if there is a legitimate reason to treat them differently.²⁷⁴ Criteria such as how many persons are dependent upon the taxpayer's income can affect a taxpayer's liability. The Court has made clear that "[t]he right to make exemptions is involved in the right to select the subjects of taxation, and apportion the public burdens among them"²⁷⁵

Long ago, Professor Surrey illustrated the inequitable effect of tax incentives by using the example of the mortgage interest deduction.²⁷⁶ If one owns a house with a mortgage, the interest paid is deductible.²⁷⁷ Professor Surrey observed that if one chooses to rent, then the tax savings subsidy available to homeowners is not forthcoming.²⁷⁸ Homeowners are favored at the expense of renters. Many might argue that the government should favor homeowners because it is good policy to promote the investment and the stability that home ownership represents.

There are other instances where treating people unequally might be better policy. For example, the altruistic are favored over the parsimonious by the charitable deduction. Those who put property to productive use generate a cost recovery deduction under the Accelerated Cost Recovery system.²⁷⁹ Resort, under an income tax system, to various deductions and credits, necessarily results in disproportionality. Any income tax system which contemplates a system of deductions or credits necessarily contemplates different rates of taxation. To suggest that any tax system could be perfectly proportional, however attractive the proposition, is to suggest a system unworkable in the world in which we live.²⁸⁰

Richard Epstein also recognized this reality. He conceded that if resort is made to a proportional or "flat" tax, then the definition of taxable income reaches constitutional dimension.²⁸¹ Epstein realized that deductions and credits have real progressivity effects. His response, however, is

274. "Equity requires adjusting . . . differing capabilities while keeping the adjustment criteria as free of special provisions and ambiguities as possible." BREAK & PECHMAN, *supra* note 27, at 6.

275. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 299 (1898); *see also* Hackett, *supra* note 8, at 436-38 (1916) (criticizing the class warfare aspects of progressive taxation).

276. Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 721 (1970).

277. *See* I.R.C. § 163 (1999).

278. *See* Surrey, *supra* note 276, at 720-25.

279. The principle of horizontal equity is also violated by preferential treatment of income such as capital gains and interest on government obligations. *See* Hudson, *supra* note 27, at 3.

280. The point is that the government has the power to create deductions and preferences; the mere existence of them does not matter. A second point is that regressive deductions, like the mortgage interest deduction, tend to make progressive rate structures less progressive. Before complaining that a progressive income tax is constitutionally suspect, critics should realize that because of the system of deductions and credits, the rate structure may be less progressive than it appears to be.

281. EPSTEIN, *supra* note 13, at 300-302.

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to except from constitutional question those deviations from a pure proportional tax which “do not generate any systematic disproportionate impact.”²⁸² This advanced distinction is problematic. If a taxpayer can arrange her affairs so as to eliminate all or part of her tax liability, her decision is individually made. This individual action is irrelevant to the question of whether the sovereign’s taxing power is legitimate in the context of a deduction or in the context of differential taxation. Epstein’s position logically cannot be maintained.²⁸³

My point, therefore, is that Calvin Massey’s approach is untenable because his takings arguments would require rejection of a flat tax as well. The need for deductions and tax credits in the current tax system makes the shift to a proportional tax system that Massey endorses totally unfeasible.

C. Deference to Legislatures

The deference to Congress or to state legislatures in matters relating to tax is a theme that echoes throughout the tax cases.²⁸⁴ The Supreme Court assumes that the democratic process will, at some point, intrude to take the sting out of any rampant unfairness in taxation.²⁸⁵ Accordingly, the Supreme Court has declined to choose one scheme over another as a constitutionally permissible norm. For example, in *Container Corp. of America v. Franchise Tax Board*,²⁸⁶ the Court gave deference to California’s unitary tax system notwithstanding the fact that it resulted in a skewed tax base as compared with other, more traditional, methods of tax base determination.²⁸⁷ The Court has expressly declined to adopt, as a constitutional standard, any single method of taxation, choosing instead to leave that choice to the Congress or state legislatures.²⁸⁸

There is a practical reason for this approach. First, it eliminates the need to decide what is fair in taxation. Second, the democratic process provides a safety valve. As the Court in *Nordlinger* explained, no matter

282. *Id.* at 300.

283. An interesting question to ask under the Epstein formula is whether a proportional income tax with a generous earned income credit would be constitutional. While nominally proportional or “flat,” such a scheme could make the system highly progressive. Would such a system generate systematic disproportionate impact?

284. *See, e.g.,* *Providence Bank v. Billings*, 29 U.S. 514, 563 (1830).

285. *See, e.g.,* *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Chief Justice Marshall expressed the same thought in 1830. *See Billings*, 29 U.S. at 563.

286. 463 U.S. 159 (1983).

287. *See id.* at 169-70 (citing *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 272 (1978)).

288. *See, e.g.,* *Trinova Corp. v. Michigan Dep’t of Treasury*, 498 U.S. 358, 386 (1991); *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336, 341-42 (1989); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983); *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 272 (1978).

how unfair the tax system might be, the Court has faith that the democratic system will rectify unfairness.²⁸⁹

The approach is also harmonious with Alexander Hamilton's framework for raising revenue in the new republic. Concerned about the nation's need to raise a defense and secure loans, Hamilton was convinced that extensive restrictions should not bind the nation's ability to raise revenue.²⁹⁰ He concluded:

As the duties of superintending the national defence, and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers, to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation²⁹¹

Accordingly, "the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes."²⁹² Given that Hamilton was eyewitness to the failure of the Confederation, his preference for a powerful central government was understandable.

Thus, case law defers to legislative discretion the appropriate allocation of the tax burden.²⁹³ The Court in *Loan Ass'n v. Topeka*²⁹⁴ supported an unrestrained power to tax for public purposes because "in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government."²⁹⁵ The same logic applied to *Knowlton*, where the progressivity of the estate tax was upheld with the observation that "it transgresses no express limitation in the Constitution."²⁹⁶

289. See *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992) ("[T]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we might think a political branch has acted." (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979))).

290. See THE FEDERALIST NO. 30, (Alexander Hamilton) (Max Beloff ed., 1987).

291. THE FEDERALIST NO. 31, at 148 (Alexander Hamilton) (Max Beloff ed., 1987).

292. *Id.* at 149. An indicator of the strength of Hamilton's conviction can be found in his discussion of poll taxes. Despite his distaste for such taxes, he did not want to strip the government of that option. "As little friendly as I am to this species of imposition, I still feel a thorough conviction, that the power of having recourse to it, ought to exist in the federal government." THE FEDERALIST NO. 36, at 174 (Alexander Hamilton) (Max Beloff ed., 1987).

293. See, e.g., *Dane v. Jackson*, 256 U.S. 589, 599 (1921) ("[T]he only security of the citizen [regarding taxation] must be found in the structure of our Government itself."); *Knowlton v. Moore*, 178 U.S. 41, 109 (1900) ("[S]ome authoritative thinkers . . . contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial."); *Tappan v. Merchants' Nat'l Bank*, 86 U.S. 490, 502 (1873) ("[T]he whole machinery of taxation must be contrived and put into operation by the legislative department of the government.").

294. 87 U.S. 655 (1874).

295. *Id.* at 663.

296. *Knowlton*, 178 U.S. at 109.

Case for Progressive Taxation

As the Court stated long ago, “the United States . . . cannot be held liable for . . . its public and general acts as a sovereign.”²⁹⁷ So long as the Court finds that the government imposed the tax to perform essential government services or to fulfill a necessary government function, the Court can justify upholding the tax as necessary despite any unfair or discriminatory effects. The Court’s high standard can “be used to validate any action by a [government] that is not demonstrably lunatic.”²⁹⁸

Preserving sovereign taxation powers does result in some apparent unfair advantage for the government, but this must be balanced against the obvious need for the government to function. The panoply of cases discussed in the previous Part recognizes that sometimes even similarly situated taxpayers can be treated differently. It requires little effort, then, to conclude that dissimilarly situated taxpayers, i.e. those with dissimilar incomes, can be taxed differently as well.²⁹⁹

V. CONCLUSION

Modern jurisprudence views with skepticism the broad applicability of the Constitution as a limitation upon the legislative power to tax. Calvin Massey’s blend of equal protection with takings jurisprudence might comport with the Supreme Court’s stance in protecting equality among groups of taxpayers in similar circumstances. The Court acts quickly to denounce a tax when the tax has the effect of creating horizontal inequities. However, vertical inequities among different economic groups, such as those inherent in progressive tax schemes, have not received the same treatment.

It might be tempting to view the government’s exercise of its inherent power to tax as a fundamentally unfair attempt to capture that which is otherwise constitutionally proscribed by the Fifth Amendment. As a practical matter, however, apart from the legal niceties, the power to tax must be upheld. The sovereign should not be challenged when it uses its constitutionally enumerated power to tax, unless such use is clearly im-

297. *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (holding that the government can impede the performance of its own contracts by sovereign acts).

298. Walter Guzzardi, Jr., *What the Supreme Court Is Really Telling Business*, FORTUNE, Jan. 1977, at 146, 149. Considering the wide latitude the Court grants the taxing officials in its recent *Nordlinger*, *Carlton*, and *Barclays* decisions, as well as the assertion that the Court defers to the sovereign’s exercise of “experimental” taxation powers, one may wonder just how far the sovereign may go in imposing taxes before reaching the threshold of harsh and oppressive. See generally *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *United States v. Carlton*, 512 U.S. 26 (1994); *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

299. This comes remarkably close to stating that there is no constitutional requirement of fairness. Nonetheless, there can be no fine distinction between a tax and a taking because the sovereign’s options are then too restricted.

proper. The Court protects the government's power to tax by setting extremely high thresholds for striking a tax as unconstitutional and by narrowly construing any claims that its power of taxation is limited in any significant way.

For the most part, the government is given free rein to act as a sovereign when exercising its sovereign powers. In matters of taxation, as Steinbeck's Muley Graves eloquently stated, we "ain't got no choice."³⁰⁰

300. See *supra* note 1.